

INDIANA LAW REVIEW

2010 SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

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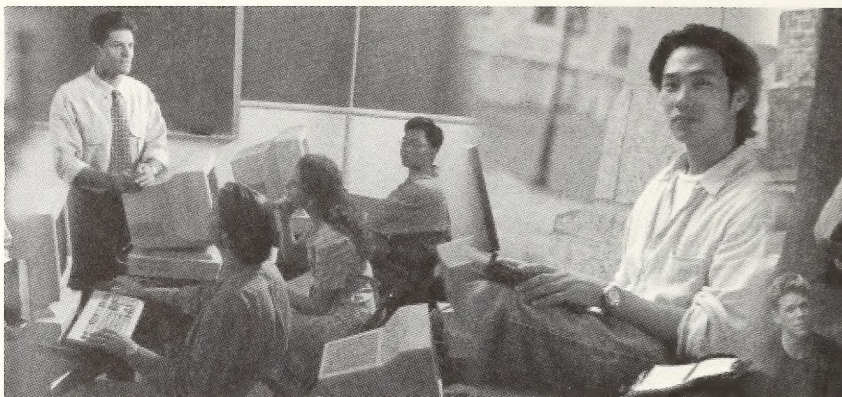
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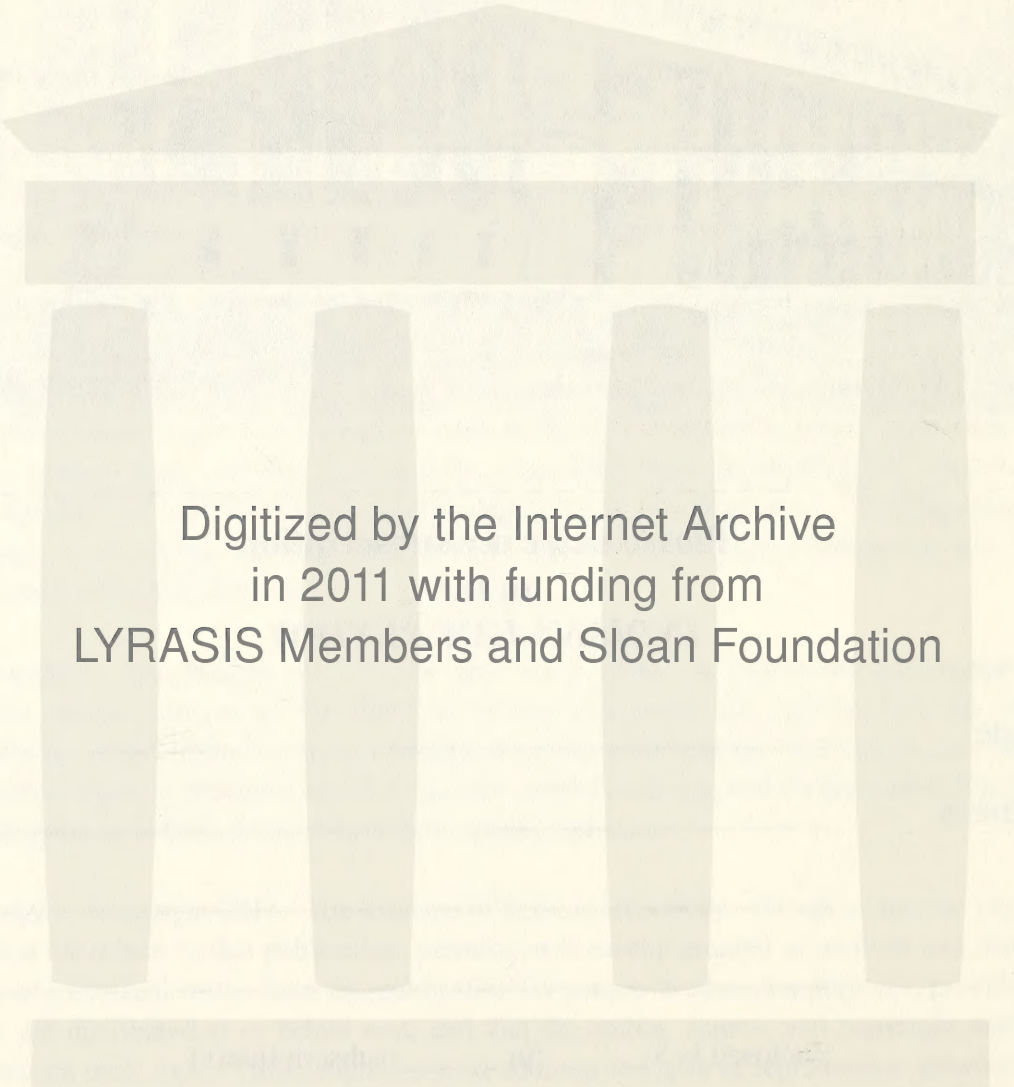
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THE JUDICIARY'S ROLE IN ECONOMIC PROSPERITY

RANDALL T. SHEPARD*

When people think of how courts affect them, they typically think in a public law mindset. They think about the “big issues” decided under constitutions. That type of judicial action dominates both public perception and legal scholarship. Thus, when people think about how courts affect them, they think more about hot-button political issues and the ubiquitously reported criminal cases. This slant toward thinking predominantly about public law is readily apparent in the multiple stories presently covering arrests and standard criminal trials and marquee constitutional litigation like the Indiana voter identification case of *Crawford v. Marion County Election Board*.¹

Private law often gets shunted to the back of people's minds because they think of it as solely affecting the parties. Far less coverage is given to tort or contract actions involving businesses or individual citizens in their economic lives. The Great Recession provides an excellent moment to consider the role of courts in the economy, because in truth, private law does have an effect beyond the parties. Businesses react to contract and tort cases. They often invest or not, innovate or not, based in part on how courts will treat them when deals go south or products fail.

Of course, courts touch the economy in non-adjudicative ways as well. Outside the courtroom, courts and judges can do their part to help promote an educated workforce and informed citizenry. Courts have the capacity to contribute to civic knowledge by webcasting their proceedings into college and secondary school classrooms, or contributing to civic education programs, or by just giving a local class a few moments of the judge's time.² There can be no doubt that a better-educated populace leads to a stronger economy. Courts must also do what they can to strengthen families because stronger families reduce crime, produce better educated citizens, and reduce poverty—all factors favorable to the economy. At a moment of sustained high unemployment, I will focus here on courts' impact on businesses and job creation.

Despite the attention given to public law, courts have always had a broader purpose than regulating how the government interacts with its people. Indeed, furthering commerce was a central goal of the early merchant courts established in the Middle Ages. When merchants in Florence desired to trade with makers of goods in Nice, they needed common rules of contract predictably enforced by courts that would ensure they would be paid.³ These merchant courts' focus on

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1. 553 U.S. 181 (2008).

2. See Randall T. Shepard, *Why the Courts Matter in Building a Strong Economy*, 36 IND. L. REV. 913, 913-14 (2003). For an excellent resource for civic education, see *The Democracy Lab*, ICIVICS.ORG, <http://www.icivics.org/> (last visited Aug. 11, 2011).

3. See Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 EMORY J. INT'L DISP. RESOL. 240, 241 (1987); Leon E. Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 U. TORONTO L.J. 265, 270-73, 275 (2003).

commerce separated them from other courts of the era.

Merchants needed justice delivered swiftly, before goods perished or the rising tide kept them in port. To meet these needs, the merchant courts remained somewhat informal, with relaxed procedural rules which would have hindered commerce had they applied with full force.⁴ This informality allowed the courts to render swift decisions and keep the wheels of commerce turning. The law also developed a strong sense of equity among merchants. Merchants had some confidence that the courts would strive to treat all merchants equally under the law, allowing them to trade securely abroad.⁵

In the modern regulatory state, the law is completely interwoven with the economy, and business regulation has grown beyond merely settling disputes between feuding merchants, although settling contract disputes is still a core judicial function. The ubiquitous impact of legal rules on the economy was observable in Goldman Sachs's recent debacle involving the sale of privately-held stock in Facebook. After quietly approaching many of its top clients about purchasing Facebook stock, Goldman decided not to extend the opportunity to American investors and instead sold the stock to only foreign investors.⁶ The press had extensively publicized the Facebook transaction, and Goldman feared that the Securities and Exchange Commission (SEC) would view the news coverage as advertising, thus triggering reporting requirements and creating a potential for litigation. Observing this sequence of events, one commentator declared that "SEC regulation and the litigious atmosphere it fosters" are moving capital markets offshore, with a number of U.S. companies choosing to list their stocks only on foreign exchanges.⁷

While such dramas do not often make their way into public discourse, it can hardly be doubted that businesses regularly react to the legal environment around in them and vote with their feet when raising capital or creating new jobs. In his most recent State of the Union Address, President Barack Obama emphasized that the United States needs to stay competitive with up and comers like China and India.⁸ He made multiple recommendations to Congress about how to accomplish that goal.⁹ While the nation ponders government's role in the economy, it would be good for lawyers and judges to reflect on what courts can do to keep our economy competitive.

Every year the U.S. Chamber Institute for Legal Reform, an affiliate of the

4. 1 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 537 (7th ed. 1956); Trakman, *supra* note 3, at 274-76.

5. Trakman, *supra* note 3, at 272-73.

6. See Liz Rappaport et al., *Goldman Limits Facebook Offering*, WALL ST. J. (Jan. 18, 2011), <http://online.wsj.com/article/SB10001424052748703396604576087941210274036.html>.

7. Jonathan Macey, *The SEC's Facebook Fiasco*, WALL ST. J. (Jan. 20, 2011), <http://online.wsj.com/article/SB10001424052748703954004576089840802830596.html>.

8. Barack Obama, President of the United States, Remarks by the President in the State of Union Address (Jan. 25, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>.

9. *Id.*

U.S. Chamber of Commerce, ponders this question when it releases a report ranking the business climate associated with various state judiciaries. The aim of the analysis is to “quantify how corporate attorneys view the state systems.”¹⁰ The study gives each state an overall ranking and then ranks the states in ten different categories.¹¹ The Chamber Institute surveys “in-house general counsel, senior litigators or attorneys, and other senior executives at companies with at least \$100 million in annual revenues.”¹²

When asked “[h]ow likely would you say it is that the litigation environment in a state could affect an important business decision at your company such as where to locate or do business,” 67% of respondents stated “very likely” or “somewhat likely.”¹³ This response is important because “locat[ing] or do[ing] business” could mean whether a business stays in Illinois or moves to Indiana. It could determine whether a business stays in Indiana or moves to India. “[I]mportant decisions” could also include whether to hold on to capital to pay for future lawsuits or whether to use that capital to expand and create more jobs.

All this raises the question, “What can courts do to aid job creation and retention?” There are three things that courts can do without overstepping their limited role in popular governance. First, courts must aspire to treat similar cases alike by using clear and predictable rules in tort and contract law. Second, courts must be impartial and treat all litigants alike whether they are corporations or individuals. Third, the judiciary must strive to resolve disputes quickly and without undue expense.

There are respectable principles for approaching all sorts of litigation involving any citizens, but they impact economic enterprises in ways that affect all of us. It is no secret that companies will hesitate to innovate in the face of uncertain liability.¹⁴ Innovation is what drives economic growth, and thus drives job creation. When companies are unsure of the outcome, when a deal sours, or when companies fear uncertain liability in tort, they are less likely to consummate some deals and more likely to keep some new products from the market. Justice Holmes once said of the legal profession that

[p]eople want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the

10. U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, RANKING THE STATES: LAWSUIT CLIMATE 2010, at 2 (2010).

11. The ten categories are the overall treatment of tort and contract litigation; having and enforcing meaningful venue requirements; treatment of class action suits and mass consolidation suits; damages; timeliness of summary judgment or dismissal; discovery; scientific and technical evidence; judges’ impartiality; judges’ competence; and juries’ fairness. *Id.* at 14-16.

12. *Id.* at 2.

13. *Id.* at 8.

14. Larry D. Thompson & Charles J. Cooper, *The State of the Judiciary: A Corporate Prospective*, 95 GEO. L.J. 1107, 1118 (2007).

incidence of the public force through the instrumentality of the courts.¹⁵

And thus it is that predictability allows businesses to know what actions may get them haled into court and how much they will owe. When better able to predict the risk, enterprises can more effectively plan their affairs, allowing them to expand current initiatives and enter new markets.¹⁶ Predictability and reliability also assure businesses that their contracts will be enforced and their intellectual property protected.

Some corporations are concerned about disparate treatment of corporate and individual defendants.¹⁷ Just as courts must not favor the rich over the poor, they must not extract a higher sum from corporations than they do from individuals when faced with similarly injured plaintiffs. Differing jury verdicts also hamper predictability.¹⁸ Giving jurors all the tools they need to perform effectively is a partial antidote. How might lay jurors provide respectable outcomes when we hand them instructions like the one in *Travelers Indemnity Co. of America v. Jarrells*?¹⁹ In the *Jarrells* case, the instruction on accounting for collateral payments an injured plaintiff had received was impenetrable:

If you find that [plaintiff] . . . is entitled to recover, you shall consider evidence of payment made by some collateral source to compensate [plaintiff] . . . for damages resulting from the accident in question. In determining the amount of [plaintiff's] . . . damages, you must consider the following type of collateral source payments:

Payments for worker's compensation.

In determining the amount received by [plaintiff] . . . from collateral sources, you may consider any amount [plaintiff] . . . is required to repay to a collateral source and the cost to [plaintiff] . . . of collateral benefits received. [Plaintiff] . . . may not recover more than once for any item of loss sustained.²⁰

This instruction was given in a worker's compensation case after the injured plaintiff had already received payment from the insurance company. With this instruction, it was plausible that the jury deducted the amount the insurer had already paid the plaintiff. It was also plausible that the jury calculated the damages figure assuming that the insurer would then be repaid out of that

15. Oliver Wendell Holmes, Justice, Supreme Judicial Court of Mass., *The Path of the Law*, Address at the UC Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 457 (1896).

16. See Thompson & Cooper, *supra* note 14, at 1115.

17. See *id.* at 1117.

18. *Id.*

19. 927 N.E.2d 374 (Ind. 2010).

20. *Id.* at 377.

amount.²¹ Such ambiguous jury instructions and the resulting ambiguous verdicts make planning for potential liability difficult. A small but useful contribution to more accurate verdicts in this field of law, the Indiana Supreme Court virtually announced a new jury instruction.²²

Like the merchant courts of old, modern courts can help job growth by resolving disputes quickly. Prompt resolution helps the economy in a number of ways. Faster judgments allow businesses to get paid faster after a purchaser fails to pay the agreed-upon price for the widgets it purchased. Proper use of summary judgment and Rule 12 dismissals can save both time and costs. Matters in litigation get resolved quicker, clearing up uncertainties regarding liability and saving the money required to take matters to trial unnecessarily.

As we reflect on what courts can do to improve job creation, it is also appropriate to reflect on what our courts already contribute to “the largest, most prosperous economy in the world.”²³ A recent commentator declared that our court system is a “century level advantage[]” that we have over even fast-growing economies like those of India and China.²⁴ We should not take for granted our “two-century plus track record of an independent judiciary.”²⁵ Bradford L. Smith, Microsoft’s general counsel, has firsthand experience dealing with judiciaries around the world.²⁶ In an address at the Conference on the State of the Judiciary, aptly named Our Courts and Corporate Citizenship and sponsored by the Sandra Day O’Connor Project on the State Judiciary, Smith recounted stories from foreign courts of witnesses being thrown out of courthouses by defendants, lawyers being beaten at settlement meetings, police and court officers losing or destroying evidence before trial, and “justice” being purchased for \$1000.²⁷ These problems make business transactions difficult and fortunately are unthinkable in the United States.

Smith also recounted the slowness of many foreign courts. In India, it generally takes twelve to fifteen years from the time an intellectual property case is filed until a trial court judgment is obtained.²⁸ Over the course of a decade, Microsoft filed more than seventy-five cases in India. At the end of that decade, only one of those cases had reached judgment in the trial court, and that case was

21. *Id.*

22. *Id.* at 378-79.

23. Obama, *supra* note 8.

24. Randall T. Shepard, Chief Justice of Ind., Burdened but Unbowed, State of the Judiciary Address 6 (Jan. 12, 2011), *available at* <http://www.in.gov/judiciary/supreme/stjud/2011.pdf> (citation omitted).

25. Bradford L. Smith, Senior Vice President, General Counsel, & Corporate Secretary, Microsoft Corp., Our Courts and Corporate Citizenship, Address at the Conference on the State of the Judiciary (Oct. 2, 2010), *available at* <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=621>.

26. In a twelve-month period ending in October 2008, Microsoft filed roughly 4100 lawsuits in just under seventy countries. *Id.*

27. *Id.*

28. *Id.*

still on appeal.²⁹

Our courts contribute significantly to our economic growth, especially when compared to legal systems worldwide. Beyond the judiciary's contribution to economic and political stability, we must focus on what courts can do to foster job creation. The answer is that courts must do what they do better, especially in hard economic times. Courts must maintain their independence and impartiality. They must lay down the clearest rules possible and then follow them in a predictable way so that businesses can plan their affairs. Courts must act quickly and diligently to resolve disputes. After all, courts do in fact change economic behavior, and thus, courts must be sure to do their part to work with the other two branches—within the limits of the judicial role—to help build a more prosperous society.

29. *Id.*

AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 2010*

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Few people would wish to be judged based on their first two and a half months on a job. Justice Steven David became Indiana's 106th justice when he was sworn in on October 18, 2010. Those few months cannot possibly give a complete indication of what Justice David's judicial tenure will entail. However, given the natural interest in Indiana's first new justice in more than a decade,¹ a look at Justice David's early experience on the bench is inevitable.

Justice David participated in 16 opinions in 2010. Even this small sample reveals a significant amount of judicial independence on Justice David's part. For instance, he agreed with Justices Dickson and Sullivan in only 71.4% of the seven criminal cases handed down after he joined the court. This was by far the highest level of disagreement among any of the justices. No other pair of justices agreed in less than 80% of criminal cases. Justice David's vote proved crucial, as he was in the majority in each of the criminal cases in which he participated in 2010.

In civil cases, Justice David was more in line with the other justices. While he agreed with Chief Justice Shepard in all of the nine civil cases in which he participated, his agreement with each of the other justices was a fairly standard

* The Tables presented in this Article are patterned after the annual statistics of the U.S. Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 301 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

We thank Barnes & Thornburg for its gracious willingness to devote the time, energy, and resources of its law firm to allow a project such as this to be accomplished. As is appropriate, credit for the idea for this project goes to Chief Justice Shepard. Many thanks to Kevin Betz, who initially developed this article and worked hard to bring it to fruition in years past.

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1. Before Justice David, Justice Robert Rucker was the most recent justice to join the high court. Justice Rucker's term began in November of 1999. *See* IND. COURTS, SUPREME COURT JUSTICES, <https://mycourts.in.gov/JR/Default.aspx> (last visited Aug. 13, 2011).

88.8%.

Justice David's presence was also felt in the three split decisions handed down after he took the bench. Those cases ran the gamut from the insanity defense² to the IHSAA transfer rule³ to the double jeopardy clause.⁴ Despite the diversity of these issues, Justice David was in the majority in all of them. No other judge was in the majority of all three cases, providing an early hint of how crucial the new justice's views might be going forward.

Although on the bench for just over two months, Justice David was able to hand down two majority opinions in 2010. His first opinion came in *Sanchez v. State*,⁵ in which the court revised a sentence downward. That case drew a dissent from Justice Dickson.⁶ The second opinion came in the context of the court's mandatory jurisdiction over the direct appeal of a sentence of life without parole. In *Delarosa v. State*,⁷ Justice David continued the court's tradition of giving the most care and attention to cases involving the death penalty or sentences of life without parole, where so much is at stake. *Delarosa* is worth reading for any practitioners who may want a preview of what a Justice David opinion will look like.

Table A. The court handed down a total of 108 cases in 2010, an increase over the past two years and the first time the court's caseload has topped 100 since 2006. The court has averaged 102 cases per year since the effects of the change in the court's jurisdiction began to be felt in 2003. This number continues to exceed that of the United States Supreme Court, which typically hands down fewer than 80 opinions per year despite more Justices, more clerks, and more resources. The court also handed down 12 per curiam opinions, the most since 19 in 2005.

The court yet again handed down more civil cases than criminal cases, as 61% of the court's opinions came in civil cases. In fact, since the jurisdictional change began to have an impact in 2003, civil cases have outnumbered criminal cases in every year except 2007.

Chief Justice Shepard handed down the most opinions with 30, which amounted to 28% of the court's total caseload.

Table B-1. The most noteworthy development in civil cases for 2010 was the alignment between Justice Rucker and the other members of the court. Over the past several years, Justice Rucker has stood out more than any other justice in terms of his lack of alignment with the other members of the court. In 2009, for instance, he authored more dissents than majority opinions.⁸ In 2008, he did not

2. Galloway v. State, 938 N.E.2d 699 (Ind. 2010).

3. Ind. High Sch. Athletic Ass'n v. Watson, 938 N.E.2d 672 (Ind. 2010).

4. Nicoson v. State, 938 N.E.2d 660 (Ind. 2010).

5. 938 N.E.2d 720 (Ind. 2010).

6. *Id.* at 723 (Dickson, J., dissenting).

7. 938 N.E.2d 690 (Ind. 2010).

8. See Mark J. Crandley et al., *An Examination of the Indiana Supreme Court Docket*,

agree with any other justice in more than 80% of all cases.⁹

However, Justice Rucker showed a remarkable amount of alignment with the rest of the court in 2010, agreeing with all other justices (excluding Justice David) in an average of 84% of all cases. Whether this is the start of a trend or a one-year phenomenon remains to be seen. Interestingly, Justice Rucker had his highest level of disagreement in civil cases with Justice Dickson. This marks a departure from prior years, as Justice Dickson was the justice with whom Justice Rucker most agreed in every year since 2007.

Table B-2. The justices exhibited a high level of agreement in criminal cases, despite Justice David's lower percentages of concurrence with Justices Sullivan and Dickson in criminal cases. Three different pairs of justices (Chief Justice Shepard and Justice Dickson, Justice Sullivan and Justice Rucker, and Justice Rucker and Justice Boehm) were aligned in more than 90% of cases, and Justice Boehm came close with 88.9% agreement with both Justice Dickson and Justice Sullivan. The last time there were three pairs of justices aligned in more than 90% of criminal cases was 2007.¹⁰ By contrast, in 2009, *no* two pairs of justices were aligned in more than 90% of all cases.¹¹ In fact, on multiple occasions in the past three years, some of the justices had agreed in less than 70% of criminal cases.

Table B-3. The highest level of agreement between two justices in all cases—again exempting Justice David because of the smaller sample size—was between Justice Sullivan and Justice Rucker at 89.4%. That is the opposite of 2009, when Justice Sullivan and Justice Rucker were the *least* aligned overall at 74%.¹² Justice Sullivan and Justice Rucker agreed in more than 80% only once in the five years prior to 2007. The second highest level of agreement in 2010 was between Chief Justice Shepard and Justice Sullivan at 85.5%.

Table C. The percentage of unanimous opinions increased to 78% in 2010. That marks another reversal from past experience, as the percentage of unanimous opinions had been steadily dropping since the time the court's jurisdiction changed. In 2009, the number of dissents in criminal cases exceeded those in civil cases, which has been a rare occurrence for the court.¹³ That trend also reversed course in 2010, as dissents in civil cases more than doubled those in

Dispositions, and Voting in 2009, 43 IND. L. REV. 541, 542 (2010) (discussing Justice Rucker's role as "a modern Great Dissenter").

9. For a more detailed description of 2008 voting, see generally Mark J. Crandley & P. Jason Stephenson, *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 2008*, 42 IND. L. REV. 773 (2009).

10. See Mark J. Crandley et al., *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 2007*, 41 IND. L. REV. 839, 845 (2008).

11. See generally Crandley et al., *supra* note 8.

12. *Id.* at 550.

13. *Id.* at 545.

criminal cases.

Table D. The percentage of the court's decisions that were split 3-2 dropped in 2010, as only 13% of all cases were divided 3-2. In 2009, 19% of all cases were split decisions.¹⁴ The average percentage of split decisions over the past five years is 15.6%, a number dragged upward by an anomalous year in 2008, where 24% of all cases were split decisions.¹⁵

Table E-1. The number of reversals dropped for the second straight year, as the court reversed in only 63.5% of all cases in 2010. In 2009, the court reversed in 67.4% of all cases.¹⁶ These numbers mark a decrease from prior years, as the court reversed in an average of 76% of its cases from 2005 through 2008. The reversal rate remains much higher for discretionary civil cases, as the court reversed 70% of those cases as compared with 61.5% of criminal cases coming to the court after transfer. While it remains true that the grant of transfer likely means the court will reverse a civil case, that truism is less certain than in prior years.

Table E-2. The number of petitions to transfer continues to drop. In 2010, litigants filed only 603 petitions to transfer, a departure of more than 190 from 2009. This marks the third straight year in which the number of petitions to transfer has dropped by more than 50 petitions, as 858 were filed in 2008, and only 795 were filed in 2009.¹⁷ More than 900 petitions were filed in each year between 2004 and 2008, so the decreasing number of petitions filed is a marked contrast to prior practice. There is no obvious explanation for this trend. One factor might be that the bar has become more educated about the chances that transfer will be granted, and lawyers have therefore become more selective in seeking transfer. The percentage of petitions granted was 11.1%, a higher percentage than in prior years. For instance, over the past five years, the court has granted about 9% of petitions to transfer.

Table F. The court's cases continue to cover a broad scope of topics. Not surprisingly, the Indiana Constitution was foremost among those topics in 2010 with 11 separate opinions. The court answered two certified questions from the federal courts after not having done so since 2006.¹⁸

In the past two years, this Article has predicted that free speech might be a topic the court would come back to address, given that the court had not handed an opinion in that area in more than five years. That did not change in 2010.

14. *Id.*

15. Crandley & Stephenson, *supra* note 9, at 776.

16. Crandley et al., *supra* note 8, at 546.

17. *Id.* (noting the comparison between 2008 and 2009).

18. Mark J. Crandley et al., *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 2006*, 40 IND. L. REV. 659, 671 (2007).

TABLE A
OPINIONS^a

	OPINIONS OF COURT ^b			CONCURRENCES ^c			DISSENTS ^d		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J.	9	21	30	0	0	0	2	4	6
David, J.	2	0	2	0	0	0	0	0	0
Dickson, J.	8	6	14	0	0	0	2	7	9
Sullivan, J.	7	12	19	0	0	0	2	3	5
Boehm, J.	8	7	15	0	1	1	2	4	6
Rucker, J.	5	11	16	0	1	1	1	1	2
Per Curiam	3	9	12						
Total	42	66	108	0	2	3	9	19	28

^a These are opinions and votes on opinions by each justice and in per curiam in the 2010 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The chief justice does not have any power to control the assignments other than as a member of the majority. See Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority. See *id.* at 210.

^b This is only a counting of full opinions written by each justice. Plurality opinions that announce the judgment of the court are counted as opinions of the court. It includes opinions on civil, criminal, and original actions.

^c This category includes both written concurrences, joining in written concurrence, and votes to concur in result only.

^d This category includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

TABLE B-1
VOTING ALIGNMENTS FOR CIVIL CASES^e

		Shepard	David	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		9	48	54	41	53
	S		0	2	0	0	0
	D	---	9	50	54	41	53
	N		9	63	61	52	62
	P		100%	79.4%	88.5%	78.8%	85.5%
David, J.	O	9		8	8		8
	S	0		0	0		0
	D	9	---	8	8	---	8
	N	9		9	9		9
	P	100%		88.9%	88.9%		88.9%
Dickson, J.	O	48	8		47	39	50
	S	2	0		0	0	1
	D	50	8	---	47	39	51
	N	63	9		62	53	63
	P	79.4%	88.9%		75.8%	73.6%	81.0%
Sullivan, J.	O	54	8	47		42	53
	S	0	0	0		0	0
	D	54	8	47	---	42	53
	N	61	9	62		51	61
	P	88.5%	88.9%	75.8%		82.4%	86.9%
Boehm, J.	O	41		39	42		43
	S	0		0	0		0
	D	41	---	39	42	---	43
	N	52		53	51		52
	P	78.8%		73.6%	82.4%		82.7%
Rucker, J.	O	53	8	50	53	43	
	S	0	0	1	0	0	
	D	53	8	51	53	43	---
	N	62	9	63	61	52	
	P	85.5%	88.9%	81.0%	86.9%	82.7%	

^e This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. For example, in the top set of numbers for Chief Justice Shepard, 9 is the number of times Chief Justice Shepard and Justice David agreed in a full majority opinion in a civil case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-2
VOTING ALIGNMENTS FOR CRIMINAL CASES^f

		Shepard	David	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		6	37	35	31	36
	S		0	2	0	0	0
	D	---	6	39	35	31	36
	N		7	43	43	36	43
	P		85.7%	90.7%	81.4%	86.1%	83.7%
David, J.	O	6		5	5		6
	S	0		0	0		0
	D	6	---	5	5	---	6
	N	7		7	7		7
	P	85.7%		71.4%	71.4%		85.7%
Dickson, J.	O	37	5		35	32	35
	S	2	0		0	0	0
	D	39	5	---	35	32	35
	N	43	7		43	36	43
	P	90.7%	71.4%		81.4%	88.9%	81.4%
Sullivan, J.	O	35	5	35		32	38
	S	0	0	0		0	2
	D	35	5	35	---	32	40
	N	43	7	43		36	43
	P	81.4%	71.4%	81.4%		88.9%	93.0%
Boehm, J.	O	31		32	32		32
	S	0		0	0		1
	D	31	---	32	32	---	33
	N	36		36	36		36
	P	86.1%		88.9%	88.9%		91.7%
Rucker, J.	O	36	6	35	38	32	
	S	0	0	0	2	1	
	D	36	6	35	40	33	---
	N	43	7	43	43	36	
	P	83.7%	85.7%	81.4%	93.0%	91.7%	

^f This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only criminal cases. For example, in the top set of numbers for Chief Justice Shepard, 6 is the number of times Chief Justice Shepard and Justice David agreed in a full majority opinion in a criminal case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- “O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- “S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- “D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- “N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- “P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-3
VOTING ALIGNMENTS FOR ALL CASES⁸

		Shepard	David	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		15	85	89	72	89
	S		0	4	0	0	0
	D	---	15	89	89	72	89
	N		16	106	104	88	105
	P		93.8%	84.0%	85.6%	81.8%	84.8%
David, J.	O	15		13	13		14
	S	0		0	0		0
	D	15	---	13	13	---	14
	N	16		16	16		16
	P	93.8%		81.3%	81.3%		87.5%
Dickson, J.	O	85	13		82	71	85
	S	4	0		0	0	1
	D	89	13	---	82	71	86
	N	106	16		105	89	106
	P	84.0%	81.3%		78.1%	79.8%	81.1%
Sullivan, J.	O	89	13	82		74	91
	S	0	0	0		0	2
	D	89	13	82	---	74	93
	N	104	16	105		87	104
	P	85.6%	81.3%	78.1%		85.1%	89.4%
Boehm, J.	O	72		71	74		75
	S	0		0	0		1
	D	72	---	71	74	---	76
	N	88		89	87		88
	P	81.8%		79.8%	85.1%		86.4%
Rucker, J.	O	89	14	85	91	75	
	S	0	0	1	2	1	
	D	89	14	86	93	76	---
	N	105	16	106	104	88	
	P	84.8%	87.5%	81.1%	89.4%	86.4%	

⁸ This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. For example, in the top set of numbers for Chief Justice Shepard, 15 is the total number of times Chief Justice Shepard and Justice David agreed in all full majority opinions written by the court in 2010. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE C
UNANIMITY
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES^h

Unanimous ⁱ			Unanimous with Concurrence ^j			Opinions with Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
34	44	78 (72.9%)	0	2	2 (1.9%)	8	19	27 (25.2%)	107

^h This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and all concur, it is still considered unanimous. It also tracks the percentage of overall opinions with concurrence and overall opinions with dissent.

ⁱ A decision is considered unanimous only when all justices participating in the case voted to concur in the court’s opinion as well as its judgment. When one or more justices concurred in the result, but not in the opinion, the case is not considered unanimous.

^j A decision is listed in this column if one or more justices concurred in the result, but not in the opinion of the court or wrote a concurrence, and there were no dissents.

TABLE D
SPLIT DECISIONS^k

Justices Constituting the Majority	Number of Opinions ^l
1. Shepard, C.J., Dickson, J., Sullivan, J.	1
2. Shepard, C.J., Dickson, J., Boehm, J.	2
3. Shepard, C.J., Dickson, J., David, J.	1
4. Shepard, C.J., Sullivan, J., Rucker, J.	4
5. Shepard, C.J., Boehm, J., Sullivan, J.	1
6. Dickson, J., Boehm, J., Rucker, J.	2
7. Boehm, J., Rucker, J.	1
8. Sullivan, J., Boehm, J., Rucker, J.	1
9. Sullivan, J., Rucker, J., David, J.	1
Total ^m	14

^k This Table concerns only decisions rendered by full opinion. An opinion is counted as a split decision if two or more justices voted to decide the case in a manner different from that of the majority of the court.

^l This column lists the number of times each group of justices constituted the majority in a split decision.

^m The 2010 term’s split decisions were:

1. Shepard, C.J., Dickson, J., Sullivan, J.: *Whatley v. State*, 928 N.E.2d 202 (Ind. 2010) (Sullivan, J.).

2. Shepard, C.J., Dickson, J., Boehm, J.: *State v. Hobbs*, 933 N.E.2d 1281 (Ind. 2010) (Boehm, J.); *Reiswerg v. Statom*, 926 N.E.2d 26 (Ind. 2010) (Boehm, J.).

3. Shepard, C.J., Dickson, J., David, J.: *Nicson v. State*, 938 N.E.2d 660 (Ind. 2010) (Shepard, C.J.).

4. Shepard, C.J., Sullivan, J., Rucker, J.: *Ind. Dep’t of State Revenue v. Belterra Resort Ind., LLC*, 935 N.E.2d 174 (Ind. 2010) (Rucker, J.); *Caesars Riverboat Casino, LLC v. Kephart*, 934 N.E.2d 1120 (Ind. 2010) (Rucker, J.); *Knight v. State*, 930 N.E.2d 20 (Ind. 2010) (Rucker, J.); *St. Joseph Cnty. Comm’rs v. Nemeth*, 929 N.E.2d 703 (Ind. 2010) (Sullivan, J.).

5. Shepard, C.J., Boehm, J., Sullivan, J.: *In re Lauter*, 933 N.E.2d 1258 (Ind. 2010) (per curium).

6. Dickson, J., Boehm, J., Rucker, J.: *Sheehan Constr. Co. v. Cont’l Cas. Co.*, 935 N.E.2d 160 (Ind. 2010) (Rucker, J.); *Baugh v. State*, 933 N.E.2d 1277 (Ind. 2010) (Dickson, J.).

7. Bohm, J., Rucker, J.: *Ind. Family & Soc. Servs. Admin. v. Meyer*, 927 N.E.2d 367 (Ind. 2010) (Boehm, J.).

8. Sullivan, J., Boehm, J., Rucker, J.: *Hopper v. State*, 934 N.E.2d 1086 (Ind. 2010) (Boehm, J.).

9. Sullivan, J., Rucker, J., David, J.: *Galloway v. State*, 938 N.E.2d 699 (Ind. 2010) (Sullivan, J.).

TABLE E-1
DISPOSITION OF CASES REVIEWED BY TRANSFER
AND DIRECT APPEALSⁿ

	Reversed or Vacated ^o	Affirmed	Total
Civil Appeals Accepted for Transfer	28 (70.0%)	12 (30.0%)	40
Direct Civil Appeals	1 (33.3%)	2 (66.7%)	3
Criminal Appeals Accepted for Transfer	24 (61.5%)	15 (38.5%)	39
Direct Criminal Appeals	1 (33.3%)	2 (66.7%)	3
Total	54 (63.5%)	31 (36.5%)	85 ^p

ⁿ Direct criminal appeals are cases in which the trial court imposed a death sentence. *See* IND. CONST. art. VII, § 4. Thus, direct criminal appeals are those directly from the trial court. A civil appeal may also be direct from the trial court. *See* IND. APP. R. 56, 63 (pursuant to Rules of Procedure for Original Actions). All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. *See* IND. APP. R. 57.

^o Generally, the term “vacate” is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, and the term “reverse” is used when the court overrules a trial court decision. A point to consider in reviewing this Table is that the court technically “vacates” every court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. *See* IND. APP. R. 58(A). As a practical matter, “reverse” or “vacate” simply represents any action by the court that does not affirm the trial court or court of appeals’s opinion.

^p This does not include 17 attorney discipline opinions, 2 judicial discipline opinions, and 5 original action. These opinions did not reverse, vacate, or affirm any other court’s decision.

TABLE E-2
DISPOSITION OF PETITIONS TO TRANSFER
TO SUPREME COURT IN 2010^a

	Denied or Dismissed	Granted	Total
Petitions to Transfer			
Civil ^r	148 (81.3%)	34 (18.7%)	182
Criminal ^s	358 (92.0%)	31 (8.0%)	389
Juvenile	30 (93.8%)	2 (6.3%)	32
Total	536 (88.9%)	67 (11.1%)	603

^a This Table analyzes the disposition of petitions to transfer by the court. *See* IND. APP. R. 58(A).
^r This also includes petitions to transfer in tax cases and workers' compensation cases.
^s This also includes petitions to transfer in post-conviction relief cases.

TABLE F
SUBJECT AREAS OF SELECTED DISPOSITIONS
WITH FULL OPINIONS^t

Original Actions	Number
• Certified Questions	2 ^u
• Writs of Mandamus or Prohibition	3 ^v
• Attorney Discipline	17 ^w
• Judicial Discipline	2 ^x
Criminal	
• Death Penalty	1 ^y
• Fourth Amendment or Search and Seizure	7 ^z
• Writ of Habeas Corpus	0
Emergency Appeals to the Supreme Court	0
Trusts, Estates, or Probate	2 ^{aa}
Real Estate or Real Property	3 ^{bb}
Personal Property	0
Landlord-Tenant	1 ^{cc}
Divorce or Child Support	2 ^{dd}
Children in Need of Services (CHINS)	4 ^{ee}
Paternity	3 ^{ff}
Product Liability or Strict Liability	1 ^{gg}
Negligence or Personal Injury	6 ^{hh}
Invasion of Privacy	2 ⁱⁱ
Medical Malpractice	2 ^{jj}
Indiana Tort Claims Act	2 ^{kk}
Statute of Limitations or Statute of Repose	3 ^{ll}
Tax, Department of State Revenue, or State Board of Tax Commissioners	2 ^{mm}
Contracts	3 ⁿⁿ
Corporate Law or the Indiana Business Corporation Law	1 ^{oo}
Uniform Commercial Code	2 ^{pp}
Banking Law	0
Employment Law	4 ^{qq}
Insurance Law	3 ^{rr}
Environmental Law	1 ^{ss}
Consumer Law	0
Workers' Compensation	4 ^{tt}
Arbitration	1 ^{uu}
Administrative Law	3 ^{vv}
First Amendment, Open Door Law, or Public Records Law	0
Full Faith and Credit	1 ^{ww}
Eleventh Amendment	0
Civil Rights	3 ^{xx}
Indiana Constitution	11 ^{yy}

^t This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 2010. It is also a quick-reference guide to court rulings for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. Also, any attorney discipline case resolved by order (as opposed to an opinion) was not considered in preparing this Table.

^u *In re* ITT Derivative Litig., 932 N.E.2d 664 (Ind. 2010); *Storie v. Randy's Auto Sales, LLC*, 926 N.E.2d 487 (Ind. 2010).

^v *State ex rel. Combs v. Decatur Cir. Ct.*, 935 N.E.2d 173 (Ind. 2010); *State ex rel. Center B v. Marion Super. Ct.*, 930 N.E.2d 1137 (Ind. 2010); *Varner v. Ind. Parole Bd.*, 922 N.E.2d 610 (Ind. 2010).

^w *In re* Cotton, 939 N.E.2d 619 (Ind. 2010); *In re* McCarthy, 938 N.E.2d 698 (Ind. 2010); *In re* Rawls, 936 N.E.2d 812 (Ind. 2010); *In re* Lauter, 933 N.E.2d 1258 (Ind. 2010); *In re* Anonymous, 932 N.E.2d 1247 (Ind. 2010); *In re* Evans, 932 N.E.2d 676 (Ind. 2010); *In re* Eley, 932 N.E.2d 675 (Ind. 2010); *In re* Anonymous, 932 N.E.2d 671 (Ind. 2010); *In re* Beal, 930 N.E.2d 1130 (Ind. 2010); *In re* Anonymous, 929 N.E.2d 778 (Ind. 2010); *In re* Admission of Atkinson, 929 N.E.2d 208 (Ind. 2010); *In re* Bowlin, 928 N.E.2d 199 (Ind. 2010); *In re* Russell, 928 N.E.2d 198 (Ind. 2010); *In re* DePrez, 928 N.E.2d 198 (Ind. 2010); *In re* Hasler, 927 N.E.2d 366 (Ind. 2010); *State ex rel. State Bar Ass'n v. United Fin. Sys. Corp.*, 926 N.E.2d 8 (Ind. 2010); *In re* Sniadecki, 924 N.E.2d 109 (Ind. 2010).

^x *In re* Moreland, 924 N.E.2d 107 (Ind. 2010); *In re* Koethe, 922 N.E.2d 613 (Ind. 2010).

^y *Kubsch v. State*, 934 N.E.2d 1138 (Ind. 2010).

^z *State v. Hobbs*, 933 N.E.2d 1281 (Ind. 2010); *Meister v. State*, 933 N.E.2d 875 (Ind. 2010); *Duran v. State*, 930 N.E.2d 10 (Ind. 2010); *Brown v. State*, 929 N.E.2d 204 (Ind. 2010); *State v. Richardson*, 927 N.E.2d 379 (Ind. 2010); *State v. Schlechty*, 926 N.E.2d 1 (Ind. 2010); *Shotts v. State*, 925 N.E.2d 719 (Ind. 2010).

^{aa} *In re* Estate of Rickert v. Taylor, 932 N.E.2d 726 (Ind. 2010); *St. Joseph Cnty. Comm'rs v. Nemeth*, 929 N.E.2d 703 (Ind. 2010).

^{bb} *Neu v. Gibson*, 928 N.E.2d 556 (Ind. 2010); *Murray v. City of Lawrenceburg*, 925 N.E.2d 728 (Ind. 2010); *Carter v. Nugent Sand Co.*, 925 N.E.2d 356 (Ind. 2010).

^{cc} *Hamilton Cnty. Prop. Tax Assessment Bd. of Appeals v. Oaken Bucket Partners, LLC*, 938 N.E.2d 654 (Ind. 2010).

^{dd} *Bingley v. Bingley*, 935 N.E.2d 152 (Ind. 2010); *Johnson v. Johnson*, 920 N.E.2d 253 (Ind. 2010).

^{ee} *In re* L.D., 938 N.E.2d 666 (Ind. 2010); *In re* I.A., 934 N.E.2d 1127 (Ind. 2010); *In re* I.B., 933 N.E.2d 1264 (Ind. 2010); *In re* N.E., 919 N.E.2d 102 (Ind. 2010).

^{ff} *In re* P.S.S., 934 N.E.2d 737 (Ind. 2010); *In re* N.L.P., 926 N.E.2d 20 (Ind. 2010); *In re* N.E., 919 N.E.2d 102 (Ind. 2010).

^{gg} *TRW Vehicle Safety Sys. v. Moore*, 936 N.E.2d 201 (Ind. 2010).

^{hh} *Id.*; *Caesars Riverboat Casino, LLC v. Kephart*, 934 N.E.2d 1120 (Ind. 2010); *Kroger Co. v. Plonski*, 930 N.E.2d 1 (Ind. 2010); *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742 (Ind. 2010); *Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722 (Ind. 2010); *Sibbing v. Cave*, 922 N.E.2d 594 (Ind. 2010).

ⁱⁱ *West v. Wadlington*, 933 N.E.2d 1274 (Ind. 2010); *Dugan v. Mittal Steel USA Inc.*, 929 N.E.2d 184 (Ind. 2010).

^{jj} *Eads v. Cmty. Hosp.*, 932 N.E.2d 1239 (Ind. 2010); *Ind. Patient's Comp. Fund v. Patrick*, 929 N.E.2d 190 (Ind. 2010).

^{kk} *Wilson v. Isaacs*, 929 N.E.2d 200 (Ind. 2010); *Bules v. Marshall Cnty.*, 920 N.E.2d 247 (Ind. 2010).

^{ll} *Eads v. Cmty. Hosp.*, 932 N.E.2d 1239 (Ind. 2010); *Reiswerg v. Statom*, 926 N.E.2d 26 (Ind. 2010); *Murray v. City of Lawrenceburg*, 925 N.E.2d 728 (Ind. 2010).

^{mm} *Hamilton Cnty. Prop. Tax Assessment Bd. of Appeals v. Oaken Bucket Partners, LLC*, 938 N.E.2d 654 (Ind. 2010); *Ind. Dep't of State Revenue v. Belterra Resort Ind., LLC*, 935 N.E.2d 174 (Ind. 2010).

ⁿⁿ *In re* ITT Derivative Litig. v. ITT Corp., 932 N.E.2d 664 (Ind. 2010).

^{oo} *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742 (Ind. 2010); *Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722 (Ind. 2010); *Found. of E. Chi., Inc. v. City of E. Chi.*, 927 N.E.2d 900 (Ind. 2010).

^{pp} *Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722 (Ind. 2010); *Storie v. Randy's Auto Sales, LLC*, 926 N.E.2d 487 (Ind. 2010).

^{qq} *Ghosh v. Ind. State Ethics Comm'n*, 930 N.E.2d 23 (Ind. 2010); *Dugan v. Mittal Steel USA Inc.*, 929 N.E.2d 184 (Ind. 2010); *Beckingham v. Review Bd. of the Ind. Dep't of Workforce Dev.*, 927 N.E.2d 913 (Ind. 2010); *Giovanoni v. Review Bd. of the Ind. Dep't of Workforce Dev.*, 927 N.E.2d 906 (Ind. 2010).

^{rr} *Nat'l Union Fire Ins. Co. v. Std. Fusee Corp.*, 940 N.E.2d 810 (Ind. 2010); *Sheehan Constr. Co. v. Cont'l Cas. Co.*, 935 N.E.2d 160 (Ind. 2010); *Everett Cash Mut. Ins. v. Taylor*, 926 N.E.2d 1008 (Ind. 2010).

^{ss} *Nat'l Union Fire Ins. Co. v. Std. Fusee Corp.*, 940 N.E.2d 810 (Ind. 2010).

^{tt} *Travelers Indem. Co. of Am. v. Jarrells*, 927 N.E.2d 374 (Ind. 2010); *Everett Cash Mut. Ins. v. Taylor*, 926 N.E.2d 1008 (Ind. 2010); *Smith v. Champion Trucking Co.*, 925 N.E.2d 362 (Ind. 2010); *Wash. Twp. Fire Dep't v. Beltway Surgery Ctr.*, 921 N.E.2d 825 (Ind. 2010).

^{uu} *Ghosh v. Ind. State Ethics Comm'n*, 930 N.E.2d 23 (Ind. 2010).

^{vv} *Id.*; *Ind. Family & Soc. Servs. Admin. v. Meyer*, 927 N.E.2d 367 (Ind. 2010); *Carter v. Nugent Sand Co.*, 925 N.E.2d 356 (Ind. 2010).

^{ww} *Shotts v. State*, 925 N.E.2d 719 (Ind. 2010).

^{xx} *Koenig v. State*, 933 N.E.2d 1271 (Ind. 2010); *Murphy v. Fisher*, 932 N.E.2d 1235 (Ind. 2010); *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758 (Ind. 2010).

^{yy} *Sample v. State*, 932 N.E.2d 1230 (Ind. 2010); *Duran v. State*, 930 N.E.2d 10 (Ind. 2010); *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758 (Ind. 2010); *Brown v. State*, 929 N.E.2d 204 (Ind. 2010); *Founds. of E. Chi., Inc. v. City of E. Chi.*, 927 N.E.2d 900 (Ind. 2010); *State v. Richardson*, 927 N.E.2d 379 (Ind. 2010); *State v. Schlechty*, 926 N.E.2d 1 (Ind. 2010); *Shotts v. State*, 925 N.E.2d 719 (Ind. 2010); *Jackson v. State*, 925 N.E.2d 369 (Ind. 2010); *Beattie v. State*, 924 N.E.2d 643 (Ind. 2010); *Treadway v. State*, 924 N.E.2d 621 (Ind. 2010).

SURVEY OF INDIANA ADMINISTRATIVE LAW

JOSEPH P. ROMPALA*

INTRODUCTION

With the advent of the “regulatory state,” the work of administrative agencies has grown considerably as they struggle to serve the variety of legislative, executive, and quasi-judicial tasks that are assigned to them. Because administrative agencies are involved in nearly every aspect of the modern legal state, they are confronted by a variety of legal issues in nearly every conceivable field of law. While Indiana’s courts have developed well-settled principles for addressing the questions that arise out of administrative proceedings, it is important to review how those principles continue to be applied in an ever-shifting legal environment. The purpose of this survey article is, therefore, to provide a brief overview of how Indiana’s courts have addressed and adapted to the continually changing challenges presented by the State’s administrative agencies.

I. JUDICIAL REVIEW

A. *Standard of Review*

In most instances, judicial review of administrative actions is strictly limited and highly deferential. Several cases during the survey period help to illustrate the basic nature of judicial review of agency actions and some of its limitations.

Eastern Alliance Insurance Group v. Howell involved an appeal by a workers’ compensation insurer of a determination that it had acted with a “lack of diligence” in handling a worker’s compensation claim.¹ In the case, Elizabeth Howell suffered an injury while working for her employer in June 2005 and later suffered an aggravation of the injury in February 2007.² For most of that period, Eastern provided workers’ compensation insurance to Howell’s employer, but Eastern was replaced in October of 2006.³ Following the aggravation of her injury, Howell applied to both Eastern and her employer’s new carrier for medical compensation; however, a dispute between the two insurance companies prevented Howell from receiving compensation for nearly two and a half years.⁴ Ultimately, she “filed a an application for adjustment of claim for worker’s compensation benefits,” and following a hearing, the full Workers’ Compensation Board (the “Board”) issued a ruling finding, in part, that Eastern had acted with a “lack of diligence” in “adjusting or settling the claim for compensation.”⁵ The

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1. *E. Alliance Ins. Grp. v. Howell*, 929 N.E.2d 922 (Ind. Ct. App. 2010), *reh’g denied*.

2. *Id.* at 924.

3. *Id.*

4. *Id.*

5. *Id.* at 924-26.

Board thus imposed a penalty on Eastern for its lack of diligence, and Eastern appealed.⁶

In stating the standard of review, the court reiterated the longstanding process that is applicable to decisions of the Board; specifically, the record is first reviewed to “determine if there is any competent evidence of probative value to support the Board’s findings”, and then the court assesses “whether the findings are sufficient to support the decision.”⁷ In doing so, the court will “not reweigh the evidence or assess witness credibility.”⁸ In this case, an additional issue was presented for review, as the most central question in the appeal turned on whether the Board had properly interpreted Indiana Code section 22-3-4-12.1(a), which grants the Board authority to determine whether an insurer has “acted with a lack of diligence, in bad faith, or has committed an independent tort in adjusting or settling a claim for compensation.”⁹ In addressing that question, the court recognized that on a question of interpretation of a statute the Board is charged with enforcing, the court “employs a deferential standard of review . . . in light of . . . [the agency’s] expertise in the given area.”¹⁰ Eastern contended that a penalty for “lack of diligence” should not be assessed when the insurer is ultimately proven not to be responsible for the payment of the benefits.¹¹ In essence, Eastern sought to “conflate[] ‘lack of diligence’ with ‘bad faith.’”¹²

The court, however, disagreed. As it noted, there is a distinction between “bad faith,” which requires some evidence of conscious wrongdoing, and “lack of diligence,” which does not require such a conscious act, but merely the “failure to exercise the attention and care that a prudent person would exercise.”¹³ Further, the court noted that the legislature had created a statutory distinction between “lack of diligence” and “bad faith” so that to adopt the position held by Eastern would “merge the two concepts and obviate the distinction.”¹⁴ Therefore, the court concluded that the Board had properly interpreted the statute.¹⁵

Nevertheless, the court also considered whether the Board’s conclusion that Eastern acted with a “lack of diligence” was supported by the evidence. In doing so, the court reviewed the Board’s findings and found that the Board’s conclusions were “not supported by the Board’s own findings.”¹⁶ Specifically, the court noted that Eastern “investigated the claim, reasonably determined that it had no liability in the matter, and even offered to split Howell’s medical costs

6. *Id.* at 925.

7. *Id.* (citing *Triplett v. USX Corp.*, 893 N.E.2d 1107, 1116 (Ind. Ct. App. 2008)).

8. *Id.* at 925-26.

9. *Id.* at 925 (quoting IND. CODE § 22-3-4-12.1(a) (2010)).

10. *Id.* at 926 (quoting *Christopher R. Brown, D.D.S., Inc. v. Decatur Cnty. Mem’l Hosp.*, 892 N.E.2d 642, 646 (Ind. 2008)).

11. *Id.*

12. *Id.* at 927.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 927-28.

with . . . [the new insurer].”¹⁷ These facts, the court concluded, established that Eastern had acted prudently and without a lack of diligence, and that therefore, the Board’s determination was contrary to law.¹⁸

Several interesting questions arose concerning the scope of judicial review in *Developmental Services Alternatives, Inc. v. Indiana Family & Social Services Administration*.¹⁹ Developmental Services Alternatives (DSA) purchased “sixteen intermediate care facilities for the mentally retarded” in June 2002.²⁰ After the purchase, DSA submitted the facilities’ Medicaid cost reports to the FSSA for rate-setting.²¹ The FSSA’s contractor, a company called Myers & Stauffer, LLC (“Myers”), subsequently issued a rate determination that excluded DSA’s “intangible assets” from its “capital return factor.”²² This, in turn, had an effect on the Medicaid reimbursement rates the facilities would receive, and DSA submitted a request for reconsideration to Myers, who reversed its initial disallowance and recalculated the capital return factor and reimbursement rates.²³

Another FSSA contractor, Clifton Gunderson, LLP, however, conducted its own audit of DSA and issued a preliminary report disallowing the intangible assets on January 7, 2005—after Myers reversed its disallowance.²⁴ Clifton Gunderson issued its final audit report on April 19, 2005 and subsequently issued a rate change notice based on the disallowed assets.²⁵ DSA then sought review through the FSSA’s appeals process, which upheld the disallowances, and ultimately sought judicial review of the final order.²⁶

On appeal, DSA raised a myriad of issues, but several are particularly interesting. First, DSA argued that the ALJ’s order violated the principles of res judicata and collateral estoppel “because Myers’s rate determination constituted a final agency action . . . thereby barring Clifton Gunderson’s subsequent rate adjustment.”²⁷ The court of appeals rejected this argument, noting that the Myers rate calculations were not final agency actions within the meaning of Indiana Code section 4-21.5-1-6.²⁸ As the court noted, under that code provision, an order is final only if it is designated as final or if it “disposes of all issues in a proceeding for all parties after the exhaustion of all available administrative remedies available concerning the action.”²⁹ Because DSA had recourse to further administrative remedies after the Myers rate determinations, the court

17. *Id.* at 928.

18. *Id.*

19. 915 N.E.2d 169 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 784 (Ind. 2010).

20. *Id.* at 173.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 174.

26. *See id.* at 174-76.

27. *Id.* at 178.

28. *Id.* at 179.

29. *Id.*

concluded that those determinations were not final agency actions.³⁰

In a somewhat related argument, DSA asserted that the reasons given by Clifton Gunderson for disallowing the intangible assets were not the same as those as contained in its preliminary report.³¹ Accordingly, DSA claimed that the ALJ's determination, which relied on the Clifton Gunderson final report, was based on post hoc rationalizations and therefore subject to reversal as being "arbitrary, capricious and in violation of legal principles."³² In rejecting this argument, the court closely examined the grounds for, and application of, the general rule that an agency cannot offer post hoc rationalizations to support its decision once the process of judicial review has begun. In doing so, the court properly noted that the rule is a corollary to another well-established rule of administrative review: that the judiciary is confined to the agency record and cannot substitute its own conclusions if the agency's basis is groundless.³³ This implies that an administrative decision must stand or fall on its own merits and cannot be supplemented through surprise by articulating a new basis for its decision that could have been previously asserted, which in turn promotes considered decisionmaking by the agency.³⁴

Recognizing that DSA was not challenging a post hoc rationalization offered to the trial court, but asking that the rule be applied to an agency "*before an agency has issued a final order* and to the agency decisionmaking process itself," the court firmly rejected DSA's contention.³⁵ In doing so, it concluded that such an application would mean that an agency would "have only one chance of getting the right answer and would have no opportunity for fully exploring all the ramifications of an action," which would obviously serve to frustrate the entire decisionmaking process itself.³⁶ Thus, while the court recognized that an agency could not offer post hoc rationalizations during judicial review (and a court could not consider such rationalizations), it also recognized that an agency itself, in formulating its final order, was not precluded from considering new or revised bases for its decisions.

B. Procedural Compliance to Obtain Judicial Review

The Indiana Supreme Court recognizes that Hoosiers have a constitutional right to judicial review of actions taken by administrative agencies.³⁷ In most instances, however, access to judicial review is limited by statute or other common law requirements. For example, although it does not apply to all of the

30. *Id.* at 180.

31. *See id.* at 183-84.

32. *Id.* at 183.

33. *Id.* at 187.

34. *See id.* at 186 (citing *Word of His Grace Fellowship, Inc. v. State Bd. of Tax. Comm'rs*, 711 N.E.2d 875, 878-79 (Ind. Tax. Ct. 1999)).

35. *Id.* at 187.

36. *Id.* at 189.

37. *Ind. Dep't of Highways v. Dixon*, 541 N.E.2d 877, 880 (Ind. 1989).

state's administrative bodies, Indiana's Administrative Orders and Procedures Act (AOPA) establishes the requirements a party must comply with in order to obtain judicial review.³⁸ These requirements including the general conditions under which judicial review is available;³⁹ who has standing to seek judicial review;⁴⁰ the time for filing a petition;⁴¹ the procedures for filing a petition for review;⁴² and the standard of review a court is to apply in reviewing an agency action.⁴³ Although these requirements are well-entrenched, in many cases courts are called upon to decide whether a party has met the preconditions for judicial review and is therefore entitled to review of the agency's action by a court.

C. Exhaustion of Administrative Remedies

One requirement that must typically be fulfilled before a party is entitled to judicial review is that she exhaust her administrative remedies before seeking relief in the courts.⁴⁴ The Indiana Supreme Court decision in *Carter v. Nugent Sand Co.*⁴⁵ illustrates that point, as the court dismissed a case based on the party's failure to exhaust its administrative remedies.

Nugent Sand Co. involved a situation in which the Nugent Sand Company ("Nugent") challenged conditions imposed on a permit issued by the Indiana Department of Natural Resources (DNR). In May of 1999, Nugent leased a substantial portion of land near the Ohio River that it intended to use in its business of "salt, sand, and gravel stockpiling and transportation."⁴⁶ As part of

38. Several agencies, including the Indiana Utility Regulatory Commission, the Indiana Department of Workforce Development, the Indiana Unemployment Review Board, and the Indiana State Board of Accounts, are expressly exempted from the AOPA. See IND. CODE § 4-21.5-2-4 (2011). Likewise, certain types of agency actions, such as an action "related to an offender within the jurisdiction of the department of correction," are expressly exempted from the terms of the AOPA as well. See *id.* § 4-21.5-2-5(6).

39. *Id.* § 4-21.5-5-2.

40. *Id.* § 4-21.5-5-3.

41. *Id.* § 4-21.5-5-5.

42. *Id.* §§ 4-21.5-5-6 to -8.

43. *Id.* § 4-21.5-5-14. A reviewing court can only set aside an agency decision if it is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) contrary to constitutional right, power, privilege, or immunity;

(3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(4) without observance of procedure required by law; or

(5) unsupported by substantial evidence.

Id. § 4-21.5-5-14(d).

44. See, e.g., *Advantage Home Health Care, Inc. v. Ind. State Dep't of Health*, 829 N.E.2d 499, 503 (Ind. 2005).

45. 925 N.E.2d 356 (Ind. 2010).

46. *Id.* at 358.

its business, Nugent acquired permits from the Army Corps of Engineers as well as the DNR to construct a channel that would connect a large, man-made body of water located on the leased property with the Ohio River.⁴⁷ One of the conditions imposed by the DNR on the permit was that the Nugent “dedicate any water created to general public use.”⁴⁸

Sometime later, boaters began to enter the man-made lake through the channel that Nugent had constructed in order to allow its barges access to the Ohio River.⁴⁹ The boaters began to cause significant problems for Nugent’s operations as they obstructed barge traffic and led third-party barge operators to decline to work for Nugent.⁵⁰ After its own efforts failed to restrict the entry of the public into the channel, Nugent contacted the DNR, which informed Nugent that it considered the channel public and that it “did not intend to take action.”⁵¹ Eventually, Nugent filed a complaint seeking a declaration that the lake and the channel were private and an injunction preventing the DNR from stating that the water was open to the public.⁵² Despite a motion to dismiss by the DNR stating that Nugent had failed to exhaust its administrative remedies, the trial court ultimately granted summary judgment in Nugent’s favor.

The Indiana Supreme Court, however, considered the exhaustion issue to be dispositive in the case.⁵³ Despite Nugent’s argument that it had no notice of the need to invoke an administrative process, the DNR argued that the permit issued to Nugent clearly specified the conditions under which it was being granted and notified Nugent of its procedural remedies should it dispute one of those conditions.⁵⁴ The DNR also noted the existence of another administrative code provision which allowed Nugent to seek a “Quasi-declaratory judgment” in order to determine whether the conditions were applicable to Nugent’s specific case.⁵⁵

The supreme court concluded that unlike a situation where no administrative process existed, Nugent did have access to an administrative process to challenge the terms of the conditions.⁵⁶ Moreover, the court rejected the contention that Nugent lacked notice of the need to invoke administrative review, as “the terms imposed by DNR, ‘requiring all additional waters created by this project be dedicated to the public . . .’ were explicitly set forth” in the permits.⁵⁷ The supreme court also rejected Nugent’s contention that the trial court had discretion to retain or dismiss the case based on the decision in *Scales v. State*, 563 N.E.2d 664 (Ind. Ct. App. 1990), in which the court of appeals affirmed the dismissal of

47. *Id.*

48. *Id.* (quoting IND. CODE § 14-29-4-5(2)).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 359.

53. *See id.*

54. *Id.* at 359-60.

55. *Id.* at 360.

56. *Id.* at 360-61.

57. *Id.* at 361.

a declaratory judgment action brought while an administrative proceeding was already pending.⁵⁸ In rejecting this argument, the supreme court noted that while *Scales* set out an appropriate standard of review, the case stood for the larger proposition that courts should not “entertain requests for declaratory relief ‘if the result is to bypass available administrative procedures.’”⁵⁹ Regarding Nugent’s case, the court recognized that the declaratory judgment action was an attempt to bypass the available administrative remedies which were “ignored a decade ago” and therefore concluded that dismissal was the “appropriate outcome here.”⁶⁰

Although *Nugent Sand* illustrates the serious consequences that can arise if a party fails to exhaust administrative remedies before seeking judicial review of agency actions, there are certain circumstances when a party will be excused from doing so. The case of *Koehlinger v. State Lottery Commission*⁶¹ illustrates one such situation.

In that case, Mr. Koehlinger, on his own behalf and as a class representative, sued the State Lottery Commission of Indiana (the “Commission”) on a number of grounds related to the Commission’s handling of a scratch-off game called “Cash Blast.”⁶² The basis of the complaint arose from the fact that the Commission was forced to replace roughly two and a half million Cash Blast tickets due to a defect.⁶³ Although the Commission replaced the defective tickets, an error in its computer system for tracking unclaimed prizes treated the replacements as though they were new tickets.⁶⁴ This resulted in a subsequent error—namely, that the Commission’s website overstated the number of outstanding and unclaimed prizes available.⁶⁵ Mr. Koehlinger specifically wrote to the Commission requesting that his letter be treated as a request for administrative remedy or, alternatively, that if he needed to “complete some form other than this letter in order to invoke that procedure, [to] please send . . . [him] any such form.”⁶⁶ Despite his request, the Commission did not notify him of any available administrative remedy.⁶⁷ Similarly, other purchasers of Cash Blast tickets contacted the Commission to complain or otherwise request corrective action, and they were similarly not initially informed of an administrative process through which their complaints could be registered.⁶⁸ Eventually, however, the Commission instituted a program through which certain purchasers of Cash Blast tickets could redeem the ticket for a coupon to purchase another ticket.⁶⁹

58. *Id.* (citing *Scales v. State*, 563 N.E.2d 664, 665 (Ind. Ct. App. 1990)).

59. *Id.* (quoting *Scales*, 563 N.E.2d at 666-67).

60. *Id.* (internal citation omitted).

61. 933 N.E.2d 534 (Ind. Ct. App. 2010), *trans. denied*.

62. *Id.* at 536.

63. *Id.*

64. *Id.*

65. *Id.* at 536-37.

66. *Id.* at 537.

67. *Id.*

68. *Id.*

69. *Id.*

At roughly the same time that the Commission instituted its redemption program, Mr. Koehlinger brought suit against the Commission. Both parties eventually moved for summary judgment, which the trial court granted in favor of the Commission.⁷⁰ Despite prevailing at the trial court, the Commission contended on appeal that the trial court had erred in failing to grant it summary judgment on the grounds that the plaintiffs had not exhausted their administrative remedies before seeking judicial relief.⁷¹ In analyzing that contention, the court of appeals recognized the “strong bias” in favor of requiring the exhaustion of administrative remedies before permitting judicial review.⁷² However, the court also acknowledged that there are exceptions to that rule, including situations where the remedy is inadequate or would be futile to pursue.⁷³

In this case, the court expressed concern over whether an administrative remedy existed at all. As it stated, the “designated evidence contains myriad examples of persons attempting to contact the [l]ottery . . . and there is no indication that any of these contacts was successful in initiating any kind of administrative process.”⁷⁴ Thus, the court concluded that “the [l]ottery had no mechanism for addressing player concerns of this type at the time, leaving us in grave doubt as to the availability of an administrative remedy.”⁷⁵ The court of appeals was also not persuaded that the Commission’s decision to implement a redemption program was sufficient to create an administrative remedy for exhaustion purposes. While generally recognizing the value of allowing an agency to “correct its own errors” as a reason for requiring exhaustion, the court noted that “[i]f we allowed agencies to fashion post hoc remedies, however, it is difficult to see where it would all end; all an agency would ever have to do to avoid litigation or final resolution of any dispute would be to devise yet another ‘remedy’ to be exhausted.”⁷⁶ Stating that the “ship ha[d] sailed” with respect to the Commission’s ability to correct its error, the court ultimately concluded that the trial court had not erred in refusing to grant the Commission summary judgment on the basis of failure to exhaust administrative remedies.⁷⁷

70. *Id.* at 538.

71. *Id.* at 538-40. Although not explicitly stated in the opinion, it is not difficult to understand why the Commission might choose to pursue this particular claim. The failure to exhaust administrative remedies is not merely a procedural defect that can be waived or otherwise remedied. It is, rather, an issue of subject matter jurisdiction so that if the plaintiffs had failed to exhaust their administrative remedies, the trial court could not hear their claims in the first place. *See, e.g.,* *Austin Lakes Joint Venture v. Avon Utils., Inc.*, 648 N.E.2d 641, 644 (Ind. 1995) (stating that if a party fails to exhaust its administrative remedies when required to do so, a reviewing court is “ousted” of subject matter jurisdiction to hear the claim).

72. *Koehlinger*, 933 N.E.2d at 538 (citing *Austin Lakes Joint Venture*, 648 N.E.2d at 649).

73. *Id.* (citing *Smith v. State Lottery Comm’n*, 701 N.E.2d 926, 931 (Ind. Ct. App. 1998)).

74. *Id.* at 539.

75. *Id.*

76. *Id.* at 540.

77. *Id.* at 540.

D. Filing an Administrative Appeal in a Timely Manner

As with the exhaustion requirement, compliance with other administrative procedures can jeopardize a party's right to review of an agency action. Such was the case in *T.C. v. Review Board of the Indiana Department of Workforce Development*.⁷⁸ In that case, the Indiana Family and Social Services Administration (FSSA) terminated the employment of T.C. in April 2009.⁷⁹ T.C. subsequently applied for, and was denied, unemployment benefits by the Indiana Department of Workforce Development ("Department").⁸⁰ The Department mailed a notice of that denial on July 15, 2009.⁸¹ Included in that mailing was information concerning how T.C. could appeal the decision of the Department's appeals division, and specifically the instruction that T.C. had to file that appeal "within the statutorily required thirteen (13) day time limit" from the date the determination was mailed.⁸²

After receiving the denial, T.C. filed a pro se appeal on July 29, 2009, arguing only that the original determination was improper and that she was seeking employment.⁸³ On August 10, 2009, the administrative law judge (ALJ) dismissed the appeal for lack of jurisdiction on the ground that T.C. had failed to file a timely appeal.⁸⁴ On August 17, 2009, T.C., again acting pro se, appealed the ALJ's determination to the full Review Board; again, she only asserted that the original denial of her claim was improper and that she was seeking employment.⁸⁵ This appeal was also dismissed.

T.C. subsequently sought review by the court of appeals, arguing that the Review Board erred in affirming the ALJ's dismissal based on the untimely filing of her appeal.⁸⁶ The court agreed with the Review Board that despite her status as a pro se litigant, this argument, which had not been raised in T.C.'s appeal to the full Review Board, was waived.⁸⁷ The court of appeals, however, addressed T.C.'s secondary contention that the Review Board improperly determined that the appeal was untimely.⁸⁸ In doing so, the court reiterated that "[w]here a statute is silent as to the method of computing time, Indiana Trial Rule 6(A) applies."⁸⁹ Therefore, the court concluded that the original appeal was due on July 28, 2009—or the day before T.C. filed her appeal with the appeals division—and

78. 930 N.E.2d 29 (Ind. Ct. App. 2010).

79. *Id.* at 30.

80. *Id.*

81. *Id.*

82. *Id.* (internal citation omitted).

83. *Id.* at 31.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 32 (citing *Bright PCS/SBA Commc'ns v. Seely*, 753 N.E.2d 757, 758 (Ind. Ct. App. 2001)).

further, that there was sufficient evidence in the record to support that conclusion.⁹⁰ Accordingly, the court of appeals affirmed the Review Board's dismissal of the appeal.

E. Timely Filing of the Agency Record

Another requirement that can preclude judicial review of an agency action is the timely filing of the agency record. Several cases during the survey period addressed the effect of noncompliance with this requirement on a party's access to judicial review.

The first case, *Mosco v. Indiana Department of Child Services*,⁹¹ arose out of a state investigation by the Indiana Department of Child Services (DCS) into Mosco, a licensed child care worker, and the allegation that she had spanked a child in her care.⁹² After an ALJ determined that the "alleged victim" was a "child in need of services," Mosco sought judicial review of DCS's determination.⁹³ That petition was filed on March 20, 2009, and on May 7, 2009, DCS moved to dismiss the case on the grounds that Mosco had failed to timely file the agency record.⁹⁴ The trial court ultimately granted that motion and dismissed the case.⁹⁵

On appeal, Mosco argued that she had "substantially complied"⁹⁶ with the requirements set forth in Indiana Code section 4-21.5-5-13, which, in relevant part, requires a petitioner seeking judicial review to transmit to the reviewing court the agency record within thirty days of filing the petition.⁹⁷ Although Mosco argued that her petition had sufficient documentation to permit judicial review of the agency action, the court of appeals disagreed. Noting that the ALJ's determination relied upon a hearing and the exhibits that were admitted during the course of the hearing, the court noted that the material attached to Mosco's petition for judicial review did not include all the material relied upon by the agency as required by statute.⁹⁸ As the court of appeals concluded, "in order to for the trial court to review the ALJ's findings, Mosco's agency record needed to include the transcript of the hearing and the admitted exhibits"⁹⁹ Because that material was not presented to the trial court, the court could not review the agency action, and therefore, the court of appeals concluded that Mosco had not "substantially complied" with the filing requirements.¹⁰⁰

90. *Id.* at 32-33.

91. 916 N.E.2d 731, 732 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 791 (Ind. 2010).

92. *Id.* at 732.

93. *Id.* at 732-33.

94. *Id.* at 733.

95. *Id.* at 736.

96. *Id.* at 733.

97. IND. CODE § 4-21.5-5-13 (2011).

98. *Mosco*, 916 N.E.2d at 735.

99. *Id.*

100. *Id.* at 735-36.

The Indiana Supreme Court also addressed the question of whether a party had “substantially complied” with the requirement to file the agency record in *Indiana Family and Social Services Administration v. Meyer*.¹⁰¹ In that case, following the death of her husband, Alice Meyer formed a trust for the benefit of her descendants and provided the trust with a remainder interest in her family farm.¹⁰² Subsequently, Meyer sought Medicaid benefits but was denied based on her failure to “spend down” her assets.¹⁰³ Meyer sought a hearing with an ALJ, but she died before the process could be completed.¹⁰⁴ The trust continued the review process, and the ALJ ultimately issued a ruling assigning a value to the farm and imposing a penalty period that the trust disputed.¹⁰⁵ As the supreme court summarized the dispute, the “crux of the [t]rust’s argument” was that the ALJ and the FSSA, improperly calculated the value of the remainder, which imposed a longer penalty period than was appropriate.¹⁰⁶

The trust filed a petition for judicial review on December 8, 2006, and on January 5, 2007, it requested an extension of time to file the agency record.¹⁰⁷ Although this extension and a subsequent extension were granted, giving the trust until March 5, 2007 to file the agency record, the trust failed to file by that time.¹⁰⁸ On March 15, 2007, the FSSA admitted that it had erred in calculating the value of the remainder interest in the farm; but, roughly a month later, the FSSA sought to dismiss the case based on the trust’s failure to timely file the agency record.¹⁰⁹ The trust then requested and received permission to file the record belatedly.¹¹⁰ Ultimately, the trial court denied the motion to dismiss and ordered the FSSA to recalculate the penalty period using the proper value of the remainder interest in the farm.¹¹¹

The supreme court first addressed the question of whether a trial court could grant a motion for extension of time to file the agency record after the time for filing had passed. Looking at the statute, the court concluded that “the statute is clear. The statute places on the petitioner the responsibility to file the agency record timely . . . [and] does not excuse untimely filing or allow *nunc pro tunc* extensions.”¹¹² The court thus held that the trial court had erred in granting the extension after the March 5 deadline had passed.¹¹³

Nevertheless, the court then addressed the trust’s contention that filing the

101. 927 N.E.2d 367 (Ind. 2010).

102. *Id.* at 368.

103. *Id.*

104. *Id.*

105. *Id.* at 368-69.

106. *Id.* at 369.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 370.

113. *Id.* at 371.

full record was not necessary because the record presented to the agency was sufficient to permit judicial review of the salient question.¹¹⁴ On this point, the court agreed, stating that the “documents attached to the [t]rust’s timely petition for judicial review, taken together with [the] FSSA’s answer, were sufficient to decide the principal issue presented for judicial review.”¹¹⁵ As the court noted, although the filing of only select portions of the agency record is usually insufficient, “imperfect compliance with the filing requirement is not always fatal. A petition for review may be accepted if the materials submitted provide the trial court with ‘all that is necessary . . . to accurately assess the challenged agency action.’”¹¹⁶ The court thus concluded that due to the FSSA’s admission of error in calculating the value of the remainder interest, “there was nothing needed to resolve the valuation of the remainder interest beyond facts established by the petition and answer,” and that therefore, the trial court had properly denied the motion to dismiss.¹¹⁷

Chief Justice Shepard, with Justice Dickson, dissented with regard to whether “a petitioner can obtain judicial review under [the] AOPA without filing a certified record at all.”¹¹⁸ The Chief Justice emphasized that there was “little ambiguity on this aspect of [the] AOPA” and that he would “simply say that we ought to enforce the statute”¹¹⁹ This led the Chief Justice to question, apparently, the concept of “substantial compliance” with the filing requirement. As Chief Justice Shepard stated, “[w]hether under some theory a judicial review might proceed with a minimalist record, such a concept is plainly a slippery slope, setting in motion regular satellite litigation . . . in which private citizens and the taxpayers will spend time and money contesting whether a record is ‘complete enough.’”¹²⁰

Whether “substantial compliance” with the filing requirement remains a viable option after the *Meyer* case is yet to be decided. Nevertheless, both *Meyer* and *Mosco* illustrate the potential danger in failing to fully comply with the statute, and caution should be used in deciding whether to rely only on the documents “necessary” for judicial review rather than filing the complete agency record.

II. SCOPE AND EFFECT OF AGENCY ACTIONS

A. Breadth of Agency Authority

By nature, administrative agencies are statutory creations. Thus, it is axiomatic that they possess and can exercise only those powers that are conferred

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 372.

118. *Id.* (Shepard, C.J., dissenting).

119. *Id.*

120. *Id.* at 374.

upon them by the Indiana General Assembly. During the course of the survey period, a number of cases addressed whether an agency was entitled to act or whether its actions were consistent with its statutory mandate.

One such case was the Indiana Supreme Court's decision in *Leone v. Indiana Bureau of Motor Vehicles*.¹²¹ *Leone* arose out of the assertion that the Indiana Bureau of Motor Vehicles ("Bureau" or BMV) had overstepped its statutory authority by defining a person's "legal name" as the name on file with the Social Security Administration.

Beginning in May of 2007, the Bureau began sending notices to persons with discrepancies between the information contained on file with the Social Security Administration (SSA) and its own records.¹²² Among those who received those notices were a group of persons whose names did not match those on file with the SSA; these persons were notified that the failure to correct the discrepancy could result in the invalidation of their driver's licenses, and provided information on how to update or correct the information.¹²³ Second and third notices were sent to those persons who did not correct the information within the allotted time frame.¹²⁴

After the issuance of the second notice, Ms. Lyn Leone (ultimately joined by a number of other named plaintiffs), filed suit against the BMV seeking a declaration that the Bureau's actions were unlawful and entry of a preliminary injunction against enforcement of the policy.¹²⁵ Ms. Leone, like the other members of the certified class, had a name on her driver's license that did not match the name on file with the SSA.¹²⁶ After a hearing, the trial court denied the motion for preliminary injunction, and the matter was taken on interlocutory appeal.¹²⁷

In addressing the matter on appeal, the supreme court focused on whether the plaintiffs had established the requirements necessary for the issuance of a preliminary injunction and specifically, whether they had demonstrated a reasonable likelihood of success on the merits. On this issue, the plaintiffs, in part, argued that the "requirement that their names should match those found on their Social Security documentation established a new requirement contrary to Indiana law."¹²⁸

This dispute centered largely on whether the BMV had exceeded its statutory authority by defining "full legal name" to mean an "individual's first name,

121. 933 N.E.2d 1244 (Ind. 2010).

122. *Id.* at 1246.

123. *Id.* at 1246-47.

124. *Id.* at 1247.

125. *Id.*

126. *Id.* at 1247-48. Ms. Leone apparently received the notice from the BMV because although she uses the name "Lyn Leone" on her driver's license and has been known by that name during her adult life, her birth certificate and Social Security records list her name as "Mary Lyn Leone." *Id.* at 1247.

127. *Id.* at 1248.

128. *Id.* at 1249 (citation omitted).

middle name or names, and last name or surname, without the use of initials or nicknames.”¹²⁹ The BMV had adopted this rule because changes to the Indiana Code required that after December 31, 2007, any application for a driver’s license or identification card must include the “full legal name of the applicant.”¹³⁰ The Indiana Code further required the BMV to keep information on approved applications and to suspend or revoke driving privileges and identification cards of persons believed to have obtained the licenses or cards through fraudulent documentation.¹³¹ To facilitate this, the BMV required that names submitted with an application match those on a person’s SSA information.¹³²

The appellants argued that the Bureau had exceeded its authority by “redefining” the term “full legal name” and requiring that its records and those of the SSA match.¹³³ As the court summarized this position, “in . . . the absence of a stated definition, the statute incorporates the common law definition of a name,”¹³⁴ which Indiana common law allows a person to change freely. The court recognized that an agency ““may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law.””¹³⁵ Therefore, it engaged in a lengthy examination of whether the common law entitled a person to informally change his name and would require the state to recognize such a change.¹³⁶

The court ultimately concluded that even though “Hoosiers still may refer to themselves by any name they like,” courts “have a unique power to certify a name change.”¹³⁷ In other words, the supreme court concluded that a person does not have the power to “demand that government agencies begin using their new names without a court order.”¹³⁸ This led the court to the ultimate conclusion that statutes requiring “some formality” in applying for identification “neither obliterate common-law usage[,] nor are they driven by them.”¹³⁹ Based on this conclusion and the fact that the Indiana General Assembly anticipated the use of Social Security information to validate and verify identities, the court also concluded that BMV was “within its authority to depend on Social Security to maintain [a]ppellants’ verifiable names.”¹⁴⁰

129. *Id.* at 1249-50 (citing 170 IND. ADMIN. CODE 7-1.1-1(t)). This provision of the Administrative Code has since been repealed.

130. *Id.* at 1249 (citing IND. CODE §§ 9-24-16-2(b) & 9-14-9-2(b) (2011)).

131. *Id.* at 1250.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 1250 (quoting *Lee Alan Bryant Health Care Facilities v. Hamilton*, 788 N.E.2d 495, 500 (Ind. Ct. App. 2003)).

136. *Id.* at 1251-54.

137. *Id.* at 1254.

138. *Id.*

139. *Id.*

140. *Id.* at 1255.

Similarly, in *LaGrange County Regional Utility District v. Bubb*,¹⁴¹ the Indiana Court of Appeals addressed the scope of the Indiana Utility Regulatory Commission's (IURC) authority to issue an order after an "untimely" investigation into a petition for relief. The *LaGrange* decision had its genesis in March 2006, when the Bubbs filed a petition with the IURC's appeals division (CAD) under what was then a new statute that provided campground owners the right to petition the IURC for review of rate increases imposed by regional sewer districts.¹⁴² Despite early communication between the attorney for LaGrange and the IURC, it was not until a year after the petition was filed that the IURC's CAD informed the parties that it would conduct a review of the complaint pursuant to that statute (Indiana Code section 13-26-11-2.1.)¹⁴³

Roughly a month after the CAD informed the parties it would be conducting a review of the petition, LaGrange filed a motion to dismiss, asserting that because the IURC had not conducted a timely investigation, the agency had lost jurisdiction over the matter.¹⁴⁴ That motion was denied in May 2007, but the CAD did not issue its informal disposition until November 21, 2008—roughly thirty-two months after the initial petition was filed.¹⁴⁵ LaGrange appealed to the full IURC, arguing that the agency lacked jurisdiction over the dispute because of its failure to act in a timely manner.¹⁴⁶ The IURC ultimately determined that an agency rule which required action on certain petitions to be reviewed within twenty-one days did not apply and that the IURC retained jurisdiction over the dispute, as the CAD had acted within the scope of the statute.¹⁴⁷

On appeal, LaGrange raised two main arguments in support of its contention that the IURC had acted outside the scope of its authority. First, it pointed to title 170, rule 8.5-2-5 of the Indiana Administrative Code (pursuant to which LaGrange claimed the CAD had informed it the proceeding would be conducted), which required that the CAD conduct reviews of disputes with sewage disposal companies within twenty-one days.¹⁴⁸ The IURC determined that the rule did not apply because it governed sewage disposal companies, whereas LaGrange was a regional sewer district and, therefore, a political subdivision not encompassed by the rule.¹⁴⁹ The court of appeals agreed and went on to conclude that the IURC was not estopped from arguing that the rule was inapplicable because no significant evidence of record supported the contention that the CAD had represented that the rule would apply. Furthermore, the court was persuaded by LaGrange's inability to demonstrate any prejudice that arose from the failure to

141. 914 N.E.2d 807 (Ind. Ct. App. 2009).

142. *Id.* at 809.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 809-10.

147. *Id.* at 809, 815.

148. *Id.* at 810. 170 IND. ADMIN. CODE 8.5-2-5 has since been repealed.

149. 914 N.E.2d at 810-11.

apply the rule.¹⁵⁰

LaGrange also contended that because the statute at issue (Indiana Code section 13-26-11.2-1) requires that a review “must include a prompt and thorough investigation of the dispute,”¹⁵¹ and because the CAD did not conduct the investigation in a timely manner, the IURC was divested of jurisdiction.¹⁵² In reviewing this contention, the court of appeals reviewed a number of prior decisions in which the state’s appellate courts had considered whether the IURC lost jurisdiction over a case by failing to act within a prescribed time period.¹⁵³ The court of appeals ultimately concluded that section 13-26-11-2.1 did not require the IURC to lose jurisdiction if the investigation was less than prompt. The court based this conclusion on several points. First, it noted that the statute did purport to restrain the IURC from acting if the CAD failed to act in a prompt manner, and likewise, it did not set forth any adverse consequence should the petition be reviewed in an untimely manner.¹⁵⁴ Second, the court noted that the “prompt” requirement did not “go to the essence of the [s]tatute,” noting that it contained no specific time period in which to act.¹⁵⁵ Finally, the court concluded that if the IURC were to lose jurisdiction, the purpose of the statute would be frustrated, as the statute was meant to create a method of review for campground owners overcharged by regional sewer districts. Accordingly, depriving the IURC of jurisdiction would deprive those owners of their statutory right of review.¹⁵⁶ Therefore, the court ultimately concluded that the IURC acted within its jurisdiction in addressing the complaint.¹⁵⁷

In another supreme court decision, the court addressed the scope of agency actions when there were agencies with apparently overlapping authority. In *Ghosh v. Indiana State Ethics Commission*, the supreme court was asked to address “the jurisdiction of state agencies and the State Employee Appeals Commission (SEAC) to consider ethics code violations in ruling on terminations of state employees.”¹⁵⁸

Mr. Ghosh was a longtime engineer with the Indiana Department of Environmental Management (IDEM) who also owned an interest in a gas station in Beech Grove, Indiana.¹⁵⁹ In March of 2006, Mr. Ghosh was terminated by IDEM on the grounds that he had violated the state ethics policy by driving his state vehicle to that gas station, where he purchased gas and other items with a

150. *See id.* at 811.

151. IND. CODE § 13-26-11-2.1 (2011).

152. *LaGrange Cnty.*, 914 N.E.2d at 812.

153. *Id.* at 812-813 (*comparing* United Rural Elec. Membership Corp. v. Ind. & Mich. Elec. Co., 549 N.E.2d 1019 (Ind. 1990), *with* Hancock Cnty. Rural Elec. Membership Corp. v. City of Greenfield, 494 N.E.2d 1294 (Ind. Ct. App. 1986)).

154. *Id.* at 813.

155. *Id.* at 813-14.

156. *Id.* at 814.

157. *Id.* at 814-15.

158. *Ghosh v. Ind. State Ethics Comm’n*, 930 N.E.2d 23, 24 (Ind. 2010), *reh’g denied*.

159. *Id.* at 25.

state-issued credit card.¹⁶⁰ Ghosh appealed the termination decision to SEAC, which ultimately upheld his termination.¹⁶¹ The Office of the Inspector General, however, also filed a separate complaint with the Indiana State Ethics Commission alleging that he had violated the conflict of interest statute and misused state property in violation of the state ethics code.¹⁶² After the ethics commission determined that he had violated the conflict of interest statute, Ghosh sought judicial review of the decision, and at the same time, he attempted to challenge the termination decision by the SEAC on the grounds that it had no jurisdiction to affirm his dismissal.¹⁶³

On appeal, the Indiana Supreme Court specifically addressed whether Ghosh was collaterally estopped from reviewing the termination decision.¹⁶⁴ As the court noted, a critical component of the estoppel argument is that the “agency ruling to be given collateral estoppel effect is that ‘the issues sought to be estopped where within the jurisdiction of the agency.’”¹⁶⁵ This called into question whether IDEM had the authority to terminate Ghosh for a violation of the state’s ethics code. According to Ghosh, IDEM lacked the authority to terminate him “for cause” when the termination was premised upon a violation of the ethics code over which the State Ethics Commission has exclusive jurisdiction.¹⁶⁶ Consequently, he argued, because IDEM could not terminate him for violating the ethics code, SEAC “had no jurisdiction to address the . . . [termination].”¹⁶⁷

The supreme court disagreed, noting that under this argument, the State Ethics Commission would be required “to review any termination of a state employee when the basis for termination is an ethics violation.”¹⁶⁸ This, the court concluded, was contrary to the intent of the Indiana General Assembly, which had “unequivocally given agencies the authority to terminate their employees for ‘just cause.’”¹⁶⁹ As the court noted, under the state’s personnel policy, “‘just cause’ includes ‘violations of, or failure to comply with, [f]ederal or [s]tate laws, rules . . . dishonesty . . . [and] actions which bring the agency or the individual into

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* As explained by the court, Ghosh had already sought to challenge the SEAC’s termination decision but had that petition for judicial review dismissed for failure to timely file the agency record. *Id.*

164. *Id.* at 26.

165. *Id.* (quoting *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390, 394 (Ind. 1988)).

166. *Id.* at 26-27.

167. *Id.* at 27.

168. *Id.*

169. *Id.* This power arose from a 2005 amendment to the Indiana State Personnel Act, which authorized both the appointing authority and the ethics commission to discharge an employee “for cause.” See IND. CODE § 4-15-2-34 (2011).

disrepute or impair the effectiveness of the agency or individual.”¹⁷⁰ In the court’s view, this made it “clear that some acts that constitute just cause for termination are also ethics violations.”¹⁷¹ This led the court to conclude that “both the Ethics Commission and the appointing authority [are authorized] to address facts that constitute just cause for termination and also establish a violation of the Ethics Code” and that consequently, as IDEM had authority to terminate him, Ghosh was collaterally estopped from seeking review of his termination.¹⁷²

B. Effect of Administrative Proceedings on Judicial Proceedings

In some instances, administrative proceedings can be a prelude to, or proceed contemporaneously with, separate though related judicial proceedings. In such cases, the administrative proceeding can have interesting effects on the judicial process.

One example of this is the case of *Tony v. Elkhart County*.¹⁷³ In that case, Mr. Randy Tony was a former employee of the Elkhart County Highway Department.¹⁷⁴ During the course of his employment, Tony was injured on a number of occasions, and as a result, he faced harassment from his supervisors that included name-calling and assigning him to tasks that exceeded medical restrictions on the type of work he could perform.¹⁷⁵ This ultimately led Tony to walk off the job and seek unemployment benefits.¹⁷⁶ As part of the determination of his eligibility for unemployment, the ALJ found not only that he was “involuntarily unemployed due to a medically substantiated physical disability,” but also that the county knew of the medical condition.¹⁷⁷ Thereafter, Tony filed suit against the county alleging that he had been constructively discharged as retaliation for seeking workers’ compensation due to his injuries.¹⁷⁸ The county moved for and was granted summary judgment on the grounds that Tony could not establish that he had been constructively discharged.¹⁷⁹

On appeal, Tony claimed that the county was administratively collaterally estopped from asserting that he was not constructively discharged based on the ALJ’s determination that he was involuntarily unemployed.¹⁸⁰ The court of

170. *Id.* at 27-28. The court cited Indiana’s discipline policy statement, the updated version of which can be found at STATE OF IND., DISCIPLINE POLICY STATEMENT (2011), available at <http://www.in.gov/spd/files/discpol.pdf>.

171. *Id.* at 28.

172. *Id.*

173. 918 N.E.2d 363 (Ind. Ct. App. 2009).

174. *Id.* at 365.

175. *See id.* at 365-67.

176. *Id.* at 367.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 368.

appeals concluded, however, that the county was not collaterally estopped from denying that Tony was constructively discharged. It did so on several grounds, first noting that it was “unclear” that the standard the DWD applies in awarding unemployment benefits is “equivalent to the standard for establishing a constructive retaliatory discharge.”¹⁸¹ More importantly, however, the court noted that statutes relating to the decision and factual findings by the DWD’s ALJ are “not conclusive or binding and shall not be used as evidence in a separate or subsequent action . . . between an individual and the individual’s present or prior employer”¹⁸² Based on these statutes, the court thus determined that a DWD decision could not be used for collateral estoppel purposes in subsequent litigation.¹⁸³

Another case during the survey period addressed the authority of the judiciary to control for monitor administrative proceedings. *Indiana Department of Environmental Management v. NJK Farms, Inc.*¹⁸⁴ involved an appeal from a trial court’s determination that IDEM had breached a settlement agreement with NJK Farms. In that case, NJK Farms had purchased land on which to construct a landfill in Fountain County, Indiana and entered into an option agreement with a company called Triple G Landfills, Inc. for the purchase of the land.¹⁸⁵ Triple G’s application for a solid waste facility permit was denied in 1995 for failure to provide necessary information to IDEM.¹⁸⁶ Triple G then filed a petition for administrative review, in which NJK Farms filed a motion to substitute itself as the real party in interest on the grounds that Triple G had failed to make a payment under the terms of the option agreement.¹⁸⁷ That motion was denied in November 2000 along with Triple G’s petition for administrative review.¹⁸⁸

As a result, NJK Farms filed a petition for judicial review along with a complaint for damages against IDEM raising a variety of claims.¹⁸⁹ NJK Farms and IDEM eventually entered into a settlement agreement in September 2005 in which NJK Farms was permitted to file an application for the solid waste permit

181. *Id.* at 368-69.

182. *Id.* at 369 (citing IND. CODE §§ 22-4-17-12(h) and 22-4-32-9(b) (2011)).

183. *Id.* The court of appeals also acknowledged that in a similar case, *Uylaki v. Town of Griffith*, 878 N.E.2d 412 (Ind. Ct. App. 2007), it had concluded that collateral estoppel was appropriate based on an opinion by a DWD ALJ. *Id.* at 369 n.2. The court explained, however, that in *Uylaki*, neither party cited the applicable statutes, and it recognized that based on the statutes, it “must question” that case’s continued validity. *Id.* The court also suggested that an Indiana Supreme Court decision, *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390 (Ind. 1988), should be called into doubt insofar as it recognized the potential for the decision of a DWD ALJ to have collateral estoppel effect in civil litigation. *Tony*, 918 N.E.2d at 369 n.2.

184. 921 N.E.2d 834 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 818 (Ind. 2010).

185. *Id.* at 836.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

if certain conditions were met.¹⁹⁰ Although NJK Farms met some of those requirements, it failed to file a completed application with IDEM until February 2008. As part of the permitting process, IDEM initiated a public comment period on the application, during which the Indiana General Assembly passed new legislation that “concerned permits for solid waste landfills in counties without comprehensive zoning regulations.”¹⁹¹ After the passage of the legislation, Fountain County passed zoning ordinances relating to landfills; more importantly, IDEM informed NJK Farms that based on the new legislation, the company would be required to file a new application, and IDEM would review it for compliance with any applicable zoning ordinances.¹⁹²

Rather than file a new application, NJK Farms filed a motion in the trial court, which had retained jurisdiction over the case pending final compliance with the settlement agreement, claiming that IDEM was in breach of the agreement.¹⁹³ IDEM also denied the original application based on NJK Farms’s failure to file a new application. Ultimately, the matter returned to the trial court, which determined that it had “exclusive jurisdiction to consider the proceedings incidental to this sole application” and found that the settlement agreement was a contract enforceable against IDEM.¹⁹⁴ The trial court further found IDEM in breach of the agreement and set the matter for trial.¹⁹⁵

On interlocutory appeal, IDEM contended that the trial court did not have subject matter jurisdiction to consider whether it had breached the settlement agreement.¹⁹⁶ In addressing this contention, the court of appeals recognized that although courts usually have authority to control the “carrying out of a settlement agreement” because the settlement at issue here involved an administrative agency, it carried a different connotation here because it “los[t] its status as a strictly private contract and . . . [took] on a public interest gloss.”¹⁹⁷ The court of appeals noted that this difference had been recently addressed by the Indiana Supreme Court in *Indiana Department of Environmental Management v. Raybestos Products Co.*¹⁹⁸

In *Raybestos Products Co.*, IDEM had entered into an agreed order with Raybestos for the clean-up of a site, but it petitioned the federal Environmental Protection Agency to require a more complete clean-up of the site than was required by the agreed order.¹⁹⁹ The Indiana Supreme Court ultimately concluded

190. *See id.* at 836-38.

191. *Id.* at 839.

192. *Id.*

193. *Id.* at 839-40.

194. *Id.* at 840 (citation omitted).

195. *Id.*

196. *Id.* at 840-41.

197. *Id.* at 842 (quoting *Ind. Bell Tel. Co. v. Office of Util. Consumer Counselor*, 725 N.E.2d 432, 435 (Ind. Ct. App. 2000) (internal citations omitted)).

198. *Id.* (citing *Ind. Dep’t of Env’tl. Mgmt. v. Raybestos Prods. Co.*, 897 N.E.2d 469 (Ind. 2008)).

199. *Raybestos Prods. Co.*, 897 N.E.2d at 472.

that as an “agency action,” the agreed order was subject only to challenge only under the AOPA, and therefore, it was not subject to challenge for breach of contract in a court.²⁰⁰

The Court rejected NJK’s contention that *Raybestos* was inapplicable, as that case involved an agreed order that arose out of an administrative proceeding rather than a judicial proceeding.²⁰¹ The court of appeals did so in part because under NJK’s interpretation of the law, the trial court would be vested with “exclusive jurisdiction over NJK’s entire permit application process” and therefore “immediate jurisdiction to review IDEM’s denial of NJK’s permit on any basis,” including technical requirements.²⁰² This, the court reasoned, would undermine two of the primary purposes underlying administrative review of agency decisions: the agency’s opportunity “‘to correct its own errors, [and] to afford the parties and the courts the benefit of [the agency’s] experience and expertise.’”²⁰³ Further, as the court noted, the purpose of the original petition for judicial review was to review the denial of NJK’s motion to be substituted as the real party in interest and the denial of the permit application—matters that had been “‘resolved and settled’ by the parties.”²⁰⁴ Thus, the petition “did not confer jurisdiction on the Marion Superior Court to directly review all further actions of IDEM regarding NJK’s permit application.”²⁰⁵ Consequently, the court of appeals concluded that the AOPA provided the exclusive means for NJK Farms to challenge the decision of IDEM with respect to its permit, and the trial court lacked jurisdiction to consider NJK’s claims.²⁰⁶

C. Due Process Concerns in Administrative Proceedings

When filling a quasi-judicial function, administrative agencies have to make available the basic due process rights that ordinary litigants are entitled to, including notice and an opportunity to be heard.²⁰⁷ The following cases from the survey period consider situations where parties challenged whether they were afforded sufficient due process in an administrative proceeding.

In *Wolf Lake Pub, Inc. v. Indiana Department of Workforce Development*,²⁰⁸ the Indiana Court of Appeals addressed, in part, whether a party is denied due process when he cannot be reached for an administrative hearing due to bad cell phone reception. *Wolf Lake* involved an appeal from the dismissal of an

200. *Id.* at 474.

201. *See NJK Farms*, 921 N.E.2d at 844.

202. *Id.*

203. *Id.* (quoting *Austin Joint Lakes Venture v. Avon Utils., Inc.*, 648 N.E.2d 641, 644 (Ind. 1995)).

204. *Id.* at 844 (citation omitted).

205. *Id.*

206. *Id.* at 845.

207. *See, e.g., NOW Courier, Inc. v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 871 N.E.2d 384, 387 (Ind. Ct. App. 2007).

208. 930 N.E.2d 1138 (Ind. Ct. App. 2010).

administrative appeal for failure to appear.²⁰⁹ In January 2009, the DWD determined that a former employee of Wolf Lake had not been terminated for just cause and, as a result, was “not disqualified from receiving unemployment compensation benefits.”²¹⁰ Wolf Lake appealed that determination and was forwarded instructions on how to participate in an appeal hearing, which included a return slip onto which Wolf Lake was to provide a telephone number where it could be reached at the time of the hearing.²¹¹ The owners and representatives of Wolf Lake returned the slip, providing the DWD with a cell phone number; however, on the date and time of the hearing, the hearing ALJ could not contact them and dismissed the appeal.²¹²

Wolf Lake applied for reinstatement of the appeal, stating that the pub’s owners and representatives had been on a long-planned vacation during the hearing, that they experienced unexpectedly unreliable cell phone reception, and that they witnessed an accident which prevented them from attempting to find better reception.²¹³ The ALJ refused to reinstate the appeal for failure to state good cause, and the full Board affirmed the ALJ’s determination.²¹⁴

Wolf Lake appealed, arguing that it had been denied due process by being refused a reasonable opportunity to participate in the hearing and that the Board abused its discretion in refusing to accept additional evidence.²¹⁵ The court of appeals was ultimately not persuaded by Wolf Lake’s arguments. As it noted, the material that Wolf Lake provided to the DWD regarding the motorcycle accident indicated that the accident actually occurred the day after the hearing, and therefore, unreliable cell phone reception—not the accident—was the cause of their failure to participate.²¹⁶ On that issue, the court noted that the notice of the appeal provided to Wolf Lake contained multiple warnings regarding having access to reliable phone communications as well as the consequences of not being available during the time of the scheduled call.²¹⁷ Taking the position that despite the warnings, the owners of Wolf Lake had taken their chances with cell phone reception, the court refused to conclude that they were “denied a reasonable opportunity to participate in a fair hearing.”²¹⁸

209. *Id.* at 1140.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 1140-41.

215. *Id.* at 1141.

216. *Id.* at 1142.

217. *Id.*

218. *Id.* As to the issue of whether the DWD abused its discretion in refusing to receive additional evidence, which included evidence regarding the termination of the employee, the court noted that under the applicable provision of the Indiana Administrative Code, such a submission requires a showing of “good cause together with a showing of good reason why the evidence was not presented to [the] ALJ.” *Id.* at 1143. As the “circumstance” of bad cell phone reception was within the control of Wolf Lake, the court concluded that this was neither good cause nor good

In *Value World Inc. of Indiana v. Indiana Department of Workforce Development*,²¹⁹ the court of appeals addressed whether a party that claimed not to have received notice of an appeal had been denied due process. In that case, a former employee of Value World appealed an initial determination that he had been terminated for just cause and was therefore ineligible for unemployment benefits.²²⁰ During the appeal, the ALJ noted that Value World had not submitted a contact number and was therefore not contacted; accordingly, the ALJ determined that Value World had not carried its burden of proof and allowed the former employee to draw unemployment benefits.²²¹

Value World then sought an appeal of the ALJ's determination, arguing that it had never received notice of the hearing.²²² During the hearing on Value World's appeal, its district manager testified that the company had not received notice of the appeal and that as far as he was aware, the company had experienced no problems with mail delivery.²²³ Although Value World claimed not to have received the notice, records existed at the DWD indicating that a notice had been mailed.²²⁴ The Board ultimately concluded that there was "insufficient evidence to prove that the hearing notice was not timely received" and therefore denied the appeal.²²⁵

On appeal, Value World argued that it had rebutted the presumption of receipt of notice that exists when an administrative agency sends the notice through the mail.²²⁶ The court of appeals certainly recognized that there existed a "difficulty in proving a negative" on the part of Value World, but it also recognized that the DWD (or an applicant for unemployment benefits) would face the same challenge if either were "required to disprove Value World's claim that it did not receive notice."²²⁷ The court noted that this and the reliability of mail service were the likely rationale behind the presumption.²²⁸ However, the court also recognized that the question was ultimately one of fact, and specifically, the "quantum of evidence" necessary to overcome that presumption.²²⁹ In this case, the court concluded that based on the testimony that Value World had received mail without incident, the manner in which it processed mail, and the "lack of any evidence to demonstrate a possible reason that the notice may not have successfully made it to Value World," the Review Board's decision to dismiss the

reason to allow additional evidence to be presented and that the DWD did not abuse its discretion in refusing to consider it. *Id.*

219. 927 N.E.2d 945 (Ind. Ct. App. 2010).

220. *Id.* at 946-47.

221. *Id.* at 947.

222. *Id.*

223. *Id.*

224. *See id.*

225. *Id.*

226. *Id.* at 948.

227. *Id.* at 949.

228. *Id.*

229. *See id.*

appeal was supported by substantial evidence.²³⁰

CONCLUSION

While administrative law in the Hoosier State is largely a settled frontier, the expansive tasks which such agencies are called upon to perform demand responses from Indiana's courts and lawyers to address what are sometimes difficult and perplexing questions. This article highlights only a very few of the reported decisions in Indiana's courts concerning administrative agencies and does not address the multitude of decisions rendered each year by the agencies themselves, which never see the inside of a courtroom. Nevertheless, the agencies fill important roles for all three branches of the government and continue to serve the people of Indiana to the best of their abilities even as they, like the courts, are confronted daily with new challenges and new opportunities.

230. *Id.* at 950.

DEVELOPMENTS IN INDIANA APPELLATE PROCEDURE: RULE AMENDMENTS, REMARKABLE CASE LAW, AND COURT GUIDANCE FOR APPELLATE PRACTITIONERS

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INTRODUCTION

In 2000, the Indiana Rules of Appellate Procedure (“Appellate Rules”) were adopted. The Indiana Supreme Court, the Indiana Court of Appeals, and the Indiana Tax Court (collectively, the “appellate courts”) are collectively responsible for applying, interpreting, and updating the Appellate Rules through appellate decisions and amendment orders. This article tracks the developments in Indiana appellate procedure between October 1, 2009 and September 30, 2010 by summarizing amendments to the Appellate Rules, as well as examining and synthesizing court opinions affecting appellate procedure to provide guidance to practitioners in order to improve their appellate practice.

I. RULE AMENDMENTS

The supreme court issued its Appellate Rule amendments on September 21, 2010.¹ The court substantively amended Appellate Rules 8, 9, 14, 14.1, 15, 16, 18, 22, 30, 35, 39, 41, 45, 49, 50, 62, and 63.² These amendments took effect on January 1, 2011 and may be categorized as temporal amendments, technological amendments, procedural amendments, and form amendments.

A. Temporal Amendments—Amendments Made to the Calculation and Measurement of Days

Many of the Appellate Rules’ amendments aim to eliminate the ambiguity that existed in calculating the number of days an appellate practitioner had to file a notice or motion with the appellate courts. Problems arose in situations where a court order was decided, dated, and entered on different days. Appellate Rules 8, 9, 14, 14.1, and 62 now use the date entered or noted on the chronological case

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1. See Order Amending Indiana Rules of Appellate Procedure, No. 94S00-1003-MS-128 (Ind. Sept. 21, 2010), available at <http://www.in.gov/judiciary/orders/rule-amendments/2010/appellate-0921.pdf> [hereinafter Sept. 21, 2010 Appellate Rules Order].

2. *Id.* at 1.

summary (CCS) as the starting day for purposes of counting days.³

Appellate Rule 8 addresses the time at which the appellate court acquires jurisdiction.⁴ Previously, the rule stated that jurisdiction was acquired on the date the notice of completion of clerk's record was issued by the trial clerk.⁵ Now, the rule specifically provides that jurisdiction is granted on the date that the notice of completion of clerk's record is noted in the CCS.⁶ This modification clears up any confusion that could result from the notice being issued, delivered, and dated on different days.

Appellate Rule 9 utilizes the CCS for purposes of determining when the notice of appeal is first due to the trial court clerk.⁷ The notice must be filed "with the trial court clerk within thirty (30) days after the entry of a Final Judgment is noted in the Chronological Case Summary."⁸ The same language applies to appeals of rulings on motions to correct error.⁹

Additionally, the rule governing interlocutory appeals—Appellate Rule 14—received an update consistent with the changes to Appellate Rules 8 and 9.¹⁰ Regarding interlocutory appeals of right, notices of appeal are due to the trial court clerk "within thirty (30) days after the notation of the interlocutory order in the Chronological Case Summary."¹¹ Appellate Rule 14(B)(1), which governs the trial court's certification of a discretionary interlocutory appeal, and Appellate Rule 14(B)(2), which addresses the court of appeals's acceptance of jurisdiction over the appeal, contain the same language changes.¹² The same requirements have also been added to Appellate Rule 14(C), which governs appeals of class certification orders.¹³ Regarding expedited appeals for children's placement and/or services, Appellate Rule 14.1 now refers to the CCS for calculating the filing due dates for the notice of expedited appeal and the notice of completion of the transcript and the record.¹⁴

Several rules regarding the filing of the appellant's brief also received slight updates in the amended rules order. Appellate Rule 45 addresses the time for filing briefs and now states that the appellant's brief must be filed:

no later than thirty (30) days after: (a) the date the trial court clerk or [a]dministrative [a]gency serves its notice of completion of [c]lerk's [r]ecord on the parties pursuant to Appellate Rule 10(C) if the notice

3. *Id.* at 1-5, 17.

4. IND. APP. R. 8.

5. *See* Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 1.

6. IND. APP. R. 8.

7. IND. APP. R. 9(A)(1).

8. *Id.*

9. *Id.*

10. *See* Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 2-3.

11. IND. APP. R. 14(A).

12. IND. APP. R. 14(B)(1)-(2).

13. IND. APP. R. 14(C)(1)-(2).

14. IND. APP. R. 14.1(B)-(C).

reports that the [t]ranscript is complete or that no [t]ranscript has been requested; or (b) in all other cases, the date the trial court clerk or [a]dministrative [a]gency serves its notice of completion of the [t]ranscript on the parties pursuant to Appellate Rule 10(D).¹⁵

The rule also expressly excludes the additional three-day extension for service of the appellant's brief by mail or third-party commercial carrier under Appellate Rule 25(C).¹⁶

The amendment to Appellate Rule 63 regarding the review of tax court decisions relates to the counting of days, but it does not utilize the CCS language used in previous rule changes.¹⁷ Appellate Rule 63(C) formerly stated that a notice of intent to petition for review must be filed with the clerk no later than thirty days after the final judgment or final disposition.¹⁸ It was amended to clarify that the petition must be filed thirty days from "the date of entry in the court's docket" of the final judgment or disposition."¹⁹ A similar addition was made to Appellate Rule 63(E) regarding the filing of the actual petition for review.²⁰

B. Technological Amendments—Adjustments to the Technology Allowed in Storing and Transmitting Information

With the ever-changing nature of technology comes the necessity of revision to court practices and procedures. Previously, the Appellate Rules contained references to such antiquated storage solutions as CD-ROMs and floppy disks.²¹ The newest rule amendments help to modernize the appellate courts.

Appellate Rule 16 sets out the requirements for filing an appearance form with the court, which is necessary in order to participate in an appeal.²² Appellate Rule 16(B) contains the requirements for an appropriate appearance form and was amended to remove the language requiring the appearing attorney to state a preference of receiving orders and opinions via fax.²³ This update comes on the heels of the previous year's amendment to Appellate Rule 26, requiring all represented parties to receive court orders by e-mail and eliminating the use of fax.²⁴ Unrepresented parties are still able to request court orders via fax.²⁵ The

15. IND. APP. R. 45(B)(1).

16. *Id.* Note that IND. APP. R. 24(C)(3) provides that "[a]ll papers will be deemed served when they are . . . deposited with any third-party commercial carrier for delivery within three (3) calendar days, cost prepaid, properly addressed."

17. *See* IND. APP. R. 63.

18. *See* Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 17.

19. IND. APP. R. 63(C)(1)-(2).

20. IND. APP. R. 63(E); *see also* Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 18.

21. *See* Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 10.

22. IND. APP. R. 16.

23. *See* Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 7.

24. *See* Order Amending Indiana Rules of Appellate Procedure, No. 94S00-0901-MS-4 (Ind. Oct. 2, 2009), *available at* <http://www.in.gov/judiciary/orders/rule-amendments/2009index.html>

same elimination concerning receipt of orders and opinions via fax was made to the section addressing amicus curiae appearance forms.²⁶

The procedure for preparing an electronic transcript was updated in the amendments made to Appellate Rule 30.²⁷ Prior to this year, the Appellate Rules called for the preparation of electronic transcripts to be contained within disks, CD-ROMs, and zip drives.²⁸ The rule now simply states that transcripts may be kept in “electronic data storage devices,” appearing to incorporate all modern methods of electronic data storage and transportation.²⁹ The court also updated Appendix B to the Appellate Rules to include the approved media for electronic storage, including “USB flash memory drives, compact discs (CDs), and digital versatile discs (DVDs) specifically formatted to store electronic data in a FAT or FAT-32 file system.”³⁰ The method of submission for electronic transcripts no longer calls for delivery in a “clear, sturdy case” but now only requires an envelope bearing the trial court case number and the designated marking of “Transcript.”³¹

C. Procedural Amendments—Administrative Amendments to Procedural Rules

Many of the Appellate Rules were amended to clarify or make changes to certain administrative aspects of the appellate process. Whether they introduce new inclusions to appellate forms or update the requirements for filing motions, there are several amendments worth noting.

Appellate Rule 15 addresses the appellant’s case summary.³² Section C contains the information that must be included in the appellant’s case summary, and several additions were made to this list of requirements, including the “[d]ate [m]otion to [c]orrect [e]rror [was] denied or deemed denied, if used,” and “[w]hether [the] case was heard by a judicial officer other than a judge and, if so, whether [the] trial judge approved the proposed judgment or order.”³³ The form to be used in accordance with Appellate Rule 15 was also updated and is described below.

Appellate Rule 18, the rule pertaining to appeal bonds, was expanded to

(follow “Order Amending Indiana Rules of Appellate Procedure” PDF link); *see also* Bryan H. Babb et al., *Developments in Indiana Appellate Procedure: Rule Amendments, Remarkable Case Law, and Guidance for Appellate Practitioners*, 43 IND. L. REV. 579, 581 (2010).

25. IND. APP. R. 26(B).

26. IND. APP. R. 16(D).

27. *See* Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 10.

28. *See id.*

29. IND. APP. R. 30(A)(5).

30. IND. APP. R. app. B.

31. *See* Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 11.

32. IND. APP. R. 15.

33. IND. APP. R. 15(C)(2).

include all forms of security.³⁴ The enforcement of a final judgment is directed to be stayed in the event an appeal is made and a bond is given in place of the judgment.³⁵ Previously, the Appellate Rules only allowed for bonds or irrevocable letters of credit to satisfy this requirement.³⁶ The amendment to Appellate Rule 18 now allows for all “other form[s] of security approved by a trial court or [a]dministrative [a]gency.”³⁷

Appellate Rule 39 provides the procedure for filing a motion to stay with the appellate court.³⁸ The rule states that a motion for stay pending appeal cannot be filed with the appellate court unless the motion was filed and denied by a trial court or administrative agency.³⁹ This is the rule unless a situation exists in compliance with the updated Rule 39(C), which provides that a motion to stay pending appeal in the appellate court should contain:

certified or verified copies of the following: (1) the judgment or order to be stayed; (2) the order denying the motion for stay *or* a verified showing that (a) the trial court or [a]dministrative [a]gency has failed to rule on the motion within a reasonable time . . . or (b) extraordinary circumstances exist which excuse the filing of a motion to stay in the trial court or [a]dministrative [a]gency altogether.⁴⁰

A new section was also added to Appellate Rule 41 pertaining to materials that may be submitted by *amicus curiae*.⁴¹ The new rule explicitly states that *amicus curiae* may not file appendices or addendums to the brief that contain documents not already in the appellate record unless granted leave to do so first.⁴²

Appellate Rule 49, which addresses the requirements for filing an appendix with a brief, received new language pertaining to a situation where an appeal is dismissed before a party has an opportunity to file an appendix.⁴³ In such circumstances, “an [a]ppendix may be filed contemporaneously with the [p]etition for [r]ehearing or [t]ransfer and the [b]riefs in [r]esponse.”⁴⁴

Another rule governing appendices, Appellate Rule 50, received a substantial update pertaining to the contents of each appendix.⁴⁵ In multiple sections, any reference to the inclusion of portions of the transcript were eliminated, and the rule now precludes the use of duplicate materials already contained in the same or other appendices, unless the inclusion is necessary for completeness or

34. See Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 8.

35. *Id.*

36. See *id.*

37. IND. APP. R. 18.

38. IND. APP. R. 39.

39. IND. APP. R. 39(B).

40. IND. APP. R. 39(C)(1)-(2) (emphasis added).

41. See Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 13.

42. IND. APP. R. 41(E).

43. See Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 14.

44. IND. APP. R. 49(A).

45. See Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 15-16.

context.⁴⁶

D. Form Amendments—Updating the Forms to Be Used with the Amended Rules

The form to be used in accordance with Appellate Rule 9—Form App. 9-1, which shows the proper format for a notice of appeal—received additional language to be used under the certificate of service heading.⁴⁷ The form specifically provides that the clerk of the Indiana Supreme Court, Indiana Court of Appeals and tax court must be served a copy of the notice of appeal from the trial court.⁴⁸

Also, in accordance with the amendments to Appellate Rule 15, Appellate form 15-1, which provides the format for the appellant's case summary, received several new directives applying the new language set out in Rule 15 above.⁴⁹

II. CASE LAW INTERPRETING THE APPELLATE RULES

The Indiana Court of Appeals issues the majority of case law interpreting the Appellate Rules. The large volume of cases heard by the court of appeals gives the court more opportunities to address appellate procedure than the Indiana Supreme Court or Indiana Tax Court.

A. Acceptance of Interlocutory Appeal

1. Court May Reconsider an Interlocutory Issue That Was Previously Denied Review.—In *Murray v. City of Lawrenceburg*,⁵⁰ Murray, an alleged landowner, filed suit against the City of Lawrenceburg (“the City”) after the city subleased a disputed parcel of land to a developer in order to build a casino.⁵¹ The owner of the land was unknown for more than fifty years prior to the conveyance by the City, and Murray did not bring the action until eight years after the conveyance.⁵² Initially, the City moved for judgment on the pleadings pursuant to Indiana Trial Rule 12(C), arguing that the only cause of action available to Murray “was inverse condemnation which was barred by the six year statute of limitations for injury to real property.”⁵³ The trial court denied the City's motion and certified its order for interlocutory appeal, but the court of appeals declined to accept jurisdiction over the appeal.⁵⁴ Subsequently, the trial court denied Murray's demand for a jury trial but granted his request to certify that ruling for an

46. *Id.*; IND. APP. R. 50(A)-(B), (D)-(F).

47. Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 18-19.

48. *Id.* at 19.

49. *Id.* at 20-22.

50. 925 N.E.2d 728 (Ind. 2010).

51. *Id.* at 729-30.

52. *Id.* at 730.

53. *Id.*

54. *Id.*

interlocutory appeal.⁵⁵ The City cross-appealed, “again seeking appellate review of the trial court’s denial of their motion for judgment on the pleadings based on the statute of limitations.”⁵⁶

The court of appeals accepted Murray’s interlocutory appeal from the trial court’s denial of his jury trial demand and also reconsidered the City’s cross-appeal regarding its motion for judgment on the pleadings.⁵⁷ In addressing the concern of granting a “second bite at the apple,” the court stated, “the earlier decision by the motions panel of this court to decline interlocutory jurisdiction is not binding on us. We may reconsider rulings by the motions panel of this court because we may reconsider any of our decisions while an appeal remains *in fieri*.”⁵⁸ The Indiana Supreme Court noted with approval that

the [c]ourt of [a]ppeals acknowledged that in a discretionary interlocutory appeal it normally considers only issues raised by the trial court’s order that is the subject of the appeal. The [c]ourt of [a]ppeals noted, however, that the issue presented by defendants’ cross-appeal had previously been certified by the trial court for interlocutory appeal. Moreover, the [c]ourt of [a]ppeals found precedent for reconsideration of a motion to accept an interlocutory appeal, and held that it may reconsider any ruling while an appeal is pending.⁵⁹

Ultimately, the supreme court held that inverse condemnation was the only remedy available to Murray and that the six-year statute of limitations was appropriate to apply, barring Murray from pursuing his claims.⁶⁰ Hence, even though an interlocutory appeal was initially denied, a later appeal of a different issue could reopen a previous order certified by the trial court for interlocutory review, especially when a determination of the previous order “may be dispositive of the case and moot the jury issue.”⁶¹

2. *Voluntary Dismissal of One Count Does Not Necessarily Affect the Ability to Appeal Earlier Summary Judgment Rulings on the Only Remaining Counts.*—In *Keck v. Walker*,⁶² the Indiana Court of Appeals discussed a scenario in which an issue requiring an interlocutory appeal was later considered a final and appealable order. In *Keck*, the children of a beneficiary (the “Children”) brought suit against a testator’s personal representative, who was asserting an interest in their mother’s share of a will.⁶³ The Children charged two counts in

55. *Id.*

56. *Id.*

57. *See* *Murray v. City of Lawrenceburg*, 903 N.E.2d 93, 97 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, 925 N.E.2d 728 (Ind. 2010).

58. *Id.* at 99 (citing *Miller v. Hague Ins. Agency, Inc.*, 871 N.E.2d 406, 407 (Ind. Ct. App. 2007)).

59. *Murray*, 925 N.E.2d at 730 (internal citations omitted).

60. *Id.* at 733-34.

61. *Id.* at 730-31.

62. 922 N.E.2d 94 (Ind. Ct. App. 2010).

63. *Id.* at 97.

the complaint: first, that based on statements made by the testator, the wills and codicils in probate were superseded by a subsequent will; and second, that the inclusion of the Children's mother in the will, coupled with statements made by the testator, indicated that the intent of the testator was to give the Children their mother's share.⁶⁴ The trial court granted partial summary judgment in favor of the estate, deciding that the bequest to the Children's mother had lapsed, thus eliminating the second count of the complaint.⁶⁵ The Children subsequently filed a motion to correct error, which was denied by the trial court, and they requested a certification of that denial for interlocutory appeal.⁶⁶ The court of appeals initially accepted interlocutory jurisdiction, but later handed down a memorandum decision finding the notice of appeal to be untimely.⁶⁷

In its explanation, the court reasoned that because the trial court's order granting partial summary judgment was not dispositive of the entire case and only dismissed one count, a motion to correct error was improper, and the motion should be classified as a motion to reconsider.⁶⁸ Going further, the court explained that a motion to reconsider does not extend the amount of time permitted to make any other filings, pursuant to Indiana Trial Rule 53.4(A).⁶⁹ Accordingly, the court noted that the Children should have filed their motion for certification of interlocutory appeal within thirty days of the trial court's summary judgment order.⁷⁰

On remand, the Children voluntarily dismissed their first count, leaving only the second count, which had been dismissed by summary judgment.⁷¹ The Children argued that their voluntary dismissal of count one had the effect of "retroactively" transforming "the earlier order granting partial summary judgment into a final order," which the court of appeals stated was "absurd."⁷² Nonetheless, the court noted that the trial court's order approving the dismissal of count one was a final judgment from which the Children timely filed a notice of appeal.⁷³ In sum, the Children's failure to timely seek an interlocutory appeal of the partial summary judgment order in favor of the estate did not bar them from challenging the trial court's summary judgment order following final judgment.⁷⁴

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 97-98.

68. *Id.* at 98.

69. *Id.* (noting that a motion to reconsider does not "extend the time for any further required or permitted action, motion, or proceedings").

70. *Id.*

71. *Id.*

72. *Id.* at 99.

73. *Id.*

74. *Id.*

B. Courts May Address the Timeliness of an Appeal Sua Sponte

The court addressed the allocation of attorneys' fees as the product of discovery sanctions in *Johnson v. Estate of Brazill*.⁷⁵ *Johnson* involved an attorney who committed certain abuses while engaging in the process of discovery and was ordered to pay the attorneys' fees of several parties in opposition to his client.⁷⁶ The disciplinary actions were addressed separately in orders dated September 22, 2008 and October 20, 2008.⁷⁷ The attorney filed a motion to reconsider the orders, which was denied by the trial court.⁷⁸ After the attorney failed to pay back the fees as ordered, the owed parties sought to obtain the money through proceedings supplemental.⁷⁹ The trial court ordered payment by an order dated December 30, 2008.⁸⁰ The attorney subsequently appealed that order on January 22, 2009.⁸¹

In consideration of the appeal, the court of appeals stated, "Although neither party presents the timeliness of . . . [the attorney's] appeal as an issue, the timeliness of an appeal is a jurisdictional matter which we should raise *sua sponte* if the parties do not."⁸² The court then held that the attorney failed to file a timely appeal for each of the separate discovery sanctions.⁸³ The court's reasoning rested upon the fact that the December order from which the attorney initiated the appeal was not the first instance where the trial court ordered him to pay the fees.⁸⁴

Citing *State v. Kuespert*,⁸⁵ the court noted that "an order requiring one party to pay attorney fees to another party as a discovery sanction is appealable as of right because it forces the party to pay money."⁸⁶ The sanctions delivered in September and October constituted a separate interlocutory order that was appealable under Indiana Appellate Rule 14(A)(1).⁸⁷ The attorney had thirty days from the issuing of those orders to file an interlocutory appeal, and because he failed to do so, he waived the right to an appeal of those sanctions.⁸⁸

The court stated that the December order did not act to delay the time period

75. 917 N.E.2d 1235 (Ind. Ct. App. 2009).

76. *Id.* at 1237-38.

77. *Id.*

78. *Id.*

79. *Id.* at 1238.

80. *Id.*

81. *Id.*

82. *Id.* at 1239 (citing *Young v. Estate of Sweeney*, 808 N.E.2d 1217, 1219 (Ind. Ct. App. 2004)).

83. *Id.* at 1239-40.

84. *Id.* at 1240.

85. 425 N.E.2d 229, 232 (Ind. Ct. App. 1981).

86. *Johnson*, 917 N.E.2d at 1239.

87. *Id.* at 1240 (providing circumstances where an interlocutory order will be taken as a matter of right).

88. *Id.* at 1241.

within which the attorney had to appeal, because then

a party ordered to pay money could repeatedly move the court to reconsider or clarify its original order, and if the trial court then modified that order in a way that did not affect the moving party's obligations under the original order, that party could then appeal from the trial court's order denying the motion to reconsider.⁸⁹

The court held that such a procedure "could allow a party to potentially delay compliance with the trial court's order, which is precisely what Trial Rule 53.4 is designed to prevent."⁹⁰ In sum, the court chose not to ignore "the jurisdictional issue of timeliness" where the party attempted to appeal an order of an earlier interlocutory order requiring payment of money.⁹¹

C. Issue Not Ripe for Appellate Review

In *Indiana Department of Environmental Management v. NJK Farms, Inc.*,⁹² the Indiana Department of Environmental Management (IDEM) brought an interlocutory appeal regarding a trial court order finding it in breach of a settlement agreement with NJK.⁹³ Among the issues raised by IDEM was whether the trial court had subject matter jurisdiction when the settlement agreement at issue was required to be filed with and approved by a regulatory agency.⁹⁴ NJK first submitted an application for a landfill in November 1991, and on February 12, 2008, IDEM deemed it complete.⁹⁵ In 2008, the Indiana General Assembly passed a law requiring new applications to include county ordinance approval for the facility.⁹⁶ NJK ignored IDEM's request to submit a new application in accordance with the new law and filed a civil lawsuit in Marion County against IDEM, alleging that the state agency breached a prior settlement agreement.⁹⁷ The trial court found that it had "exclusive jurisdiction" and that the new statute did not apply to Fountain County.⁹⁸ The court of appeals accepted jurisdiction over the interlocutory appeal pursuant to Appellate Rule 14(B).⁹⁹

The court of appeals held that because IDEM's actions were state agency actions, "the [Administrative Orders and Procedures Act] provides the exclusive

89. *Id.*

90. *Id.* (citing *Stephens v. Irvin*, 734 N.E.2d 1133, 1134 (Ind. Ct. App. 2000)).

91. *Id.* at 1242.

92. 921 N.E.2d 834 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 818 (Ind. 2010).

93. *Id.* at 835.

94. *Id.* at 840.

95. *Id.* at 836, 839.

96. *Id.* at 839 (referencing IND. CODE § 13-20-2-10 (2010)).

97. *Id.* at 840.

98. *Id.*

99. *Id.* The court of appeals noted that NJK initially filed a motion to transfer to the Indiana Supreme Court pursuant to Appellate Rule 56(A), but that motion was denied. *Id.* at 840 n.5.

means to review IDEM's actions."¹⁰⁰ The court of appeals noted that Appellate Rule 14(B) provides that "[a]n appeal may be taken from other interlocutory orders if the trial court certifies its order and the [c]ourt of [a]ppeals accepts jurisdiction over the appeal."¹⁰¹ However, the court also noted that interlocutory appeals are taken from interlocutory orders, and Appellate Rule 14(B) does not permit certification of particular issues.¹⁰² Hence, since the trial court did not have subject matter jurisdiction to consider NJK's allegations, the court of appeals did not have jurisdiction to hear the appeal. *NJK Farms* serves as a reminder that subject matter jurisdiction cannot be waived and the lack thereof will end an appeal.

Additionally, in *NJK Farms*, the court of appeals reminded practitioners that "a statement of facts that is rife with argument . . . is inappropriate in that part of an appellate brief."¹⁰³ The court stated, "A statement of facts should be a concise narrative of the facts stated in accordance with the standard of review appropriate to the judgment or order being appealed, and it should not be argumentative."¹⁰⁴

D. Cross-Petition for Rehearing Allowed in Response Brief

In *U.S. Bank, N.A. v. Integrity Land Title Corp.*,¹⁰⁵ the court of appeals held against U.S. Bank regarding an agent's liability in tort and against Integrity regarding a breach of contract claim.¹⁰⁶ U.S. Bank timely filed a petition for rehearing, asking the court to reconsider its ruling on the tort liability issue only.¹⁰⁷ In response to the petition for rehearing, Integrity addressed the tort liability issue and then asked the court to also reconsider its ruling on the breach of contract issue.¹⁰⁸ U.S. Bank filed a motion to strike the section of Integrity's response that discussed the breach of contract issue stating it was "untimely, in that it should have been raised in a separate petition for rehearing instead of in response to U.S. Bank's petition for rehearing."¹⁰⁹

The court of appeals noted that Indiana Appellate Rule 54(D) "prohibits the filing of a reply brief on rehearing," but did not grant U.S. Bank's motion to

100. *Id.* at 845.

101. *Id.* at 841.

102. *Id.*

103. *Id.* at 836 n.2 (citing *Cnty. Line Towing, Inc. v. Cincinnati Ins. Co.*, 714 N.E.2d 285, 289-90 (Ind. Ct. App. 1999)).

104. *Id.* (citing IND. APP. R. 46(A)(6)).

105. 907 N.E.2d 616 (Ind. Ct. App.), *vacated in part on reh'g*, 914 N.E.2d 320 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, 929 N.E.2d 742 (Ind. 2010).

106. *Id.* at 623.

107. *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 914 N.E.2d 320, 322 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, 929 N.E.2d 742 (Ind. 2010).

108. *Id.* at 323.

109. *Id.* (citing IND. APP. R. 54(B) (providing that "[a] [p]etition for [r]ehearing shall be filed no later than thirty (30) days after the decision")).

strike.¹¹⁰ Instead, the court held that although “U.S. Bank’s contentions are well taken,” it would reconsider its previous ruling regarding the breach of contract claim in “the interests of justice and judicial economy.”¹¹¹ Relying on the court’s “inherent power,” the court held that “justice and judicial economy would be ill served if we were to turn a blind eye to Integrity’s argument, the correctness of which is apparent on the face of the record.”¹¹² Ultimately, the court of appeals reversed its earlier opinion regarding the breach of contract claim, which had been decided adversely to Integrity.¹¹³

In dissent, Judge May argued that allowing Integrity to raise an argument in a brief in response to a petition for rehearing (that Integrity could not otherwise timely raise) was “unfair because it effectively deprive[d] U.S. Bank of an opportunity to respond to the contract argument.”¹¹⁴ Judge May argued that Integrity’s brief in response to U.S. Bank’s petition for rehearing went outside the confines of Indiana Appellate Rule 46(B)(2).¹¹⁵ Moreover, Judge May pointed out that because U.S. Bank sought rehearing on one particular point only, as opposed to a “general” petition, the court’s original opinion should “be modified *as to that point only*.”¹¹⁶

The Indiana Supreme Court granted transfer in *U.S. Bank*, and pursuant to Indiana Appellate Rule 58(A), it “summarily affirm[ed] the decision of the [Indiana] Court of Appeals” as to its holding on rehearing in favor of Integrity regarding the breach of contract issue.¹¹⁷ In doing so, the Indiana Supreme Court chose not to comment on the procedural arguments raised in Judge May’s dissent. An appellate advocate should be aware of the procedural details of *U.S. Bank* and associated risk when purporting to seek rehearing on limited issues only that were determined unfavorably.

E. Indiana Recognizes the Prison Mailbox Rule

In an opinion authored by Chief Justice Shepard, the supreme court recognized and adopted Indiana’s use of what is referred to as the prison mailbox rule.¹¹⁸ In *Dowell v. State*, the court described the rule as follows: “a *pro se*

110. *Id.*

111. *Id.* The court noted that “Integrity could renew its claim in a petition to transfer before the Indiana Supreme Court.” *Id.* at 323 n.3.

112. *Id.* at 323 (citing *Bridgestone Ams. Holding, Inc. v. Mayberry*, 854 N.E.2d 355, 360 n.4 (Ind. Ct. App. 2006); IND. APP. R. 66(C)(10) (“[A]ppellate courts may grant ‘appropriate relief’ ‘with respect to some or all of the parties or issues, in whole or in part.’”)).

113. *Id.*

114. *Id.* at 324 (May, J., dissenting) (noting that IND. APP. R. 54(D) “explicitly prohibits reply briefs on rehearing”).

115. *Id.* (noting that IND. APP. R. 46(B)(2) mandates that an appellee’s argument “address the contentions raised in the appellant’s argument”).

116. *Id.* (quoting *Griffin v. State*, 763 N.E.2d 450, 451 (Ind. 2002)).

117. *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742, 745 (Ind. 2010).

118. *See Dowell v. State*, 922 N.E.2d 605 (Ind. 2010).

incarcerated litigant who delivers a notice of appeal to prison officials for mailing on or before its due date accomplishes a timely filing.”¹¹⁹ The adoption of the rule comes from “recognizing the unique position of *pro se* prisoners.”¹²⁰ The prisoner in *Dowell* attempted to file a motion to correct error with the post-conviction court via the prison mailing system.¹²¹ He delivered his motion to the Wabash Valley Correctional Facility mail system on the final day to file the motions, but the package did not arrive at the post-conviction court until two days later.¹²² The post-conviction court denied the prisoner’s motion, and the prisoner appealed.¹²³

The State asked that the prisoner’s appeal be dismissed because his motion to correct error was not timely filed.¹²⁴ In addressing the issue of his timeliness, the Indiana Supreme Court noted that “[l]ike the Federal Rules of Appellate Procedure at the time of the *Houston* decision, the Indiana Rules of Appellate Procedure do not provide for the prison mailbox rule.”¹²⁵ In *Dowell*, the Indiana Supreme Court made explicit that the prison mailbox rule applies in Indiana.¹²⁶ The court noted, “After *Houston v. Lack*, the Federal Rules of Appellate Procedure were amended to recognize the prison mailbox rule and to reflect the limits on its application,” presumably to combat potential abuse.¹²⁷

F. Supreme Court Outlines Briefing Process for Indiana Appellate Rule 64 Certified Questions

Pursuant to Indiana Appellate Rule 64, the Indiana Supreme Court accepted certified questions from the United States Court of Appeals for the Seventh Circuit in *George v. National Collegiate Athletic Ass’n*.¹²⁸ In the published order accepting the certified questions, the court set out the procedure for the submission of supplemental briefs addressing each question.¹²⁹ The requirements for the briefs are similar to those contained in the Appellate Rules. The appellants may only submit one brief between them, entitled “Supplemental Brief of [Appellant or Appellee],” must conform to the requirements set forth in

119. *Id.* at 607 (citing *Houston v. Lack*, 487 U.S. 266 (1988)).

120. *Id.* at 606.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 607 (referencing *Houston v. Lack*, 487 U.S. 266 (1988), wherein the United States Supreme Court held that a *pro se* incarcerated litigant who delivers a notice of appeal to prison officials for mailing on or before its due date accomplishes a timely filing).

126. *Id.*

127. *Id.* at 607 n.1. This footnote seems to be an invitation to similarly amend Indiana’s Rules of Appellate Procedure.

128. 623 F.3d 1135 (7th Cir. 2010), *certified question accepted*, No. 94S00-1010-CQ-544, 2010 WL 4361443 (Ind. Oct. 29, 2010).

129. *George*, 2010 WL 4361443, at *1-2.

Appellate Rules 43, 44, and 46, and it should be under 2000 words with an attached word count certificate.¹³⁰ No appendices or briefs in response are to be filed, as all responses to opposing parties' briefs will be stated at oral argument.¹³¹ Counsel for each party must file an appearance pursuant to Appellate Rule 16(C), provide a valid e-mail address with which to receive court orders, and comply with Indiana Admission & Discipline Rule 3, section 2 regarding temporary admission to practice law in Indiana.¹³² Only those attorneys who have filed appearances and are licensed to practice law in Indiana may appear on the briefs, participate in oral argument, or receive any distributions from the clerk.¹³³ All filings are to be made with the clerk of the Indiana Supreme Court and should be served upon all counselors of record, with joint filings signed by each party.¹³⁴ Extensions will only be granted in extreme circumstances, and failure to comply with the rules for temporary admission does not constitute a reason for extension.¹³⁵

*G. Court of Appeals Further Addresses Attorneys' Fees Awarded
as a Result of Frivolous Appeal*

Appellate Rule 66(E) provides, "The [c]ourt may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the [c]ourt's discretion and may include attorneys' fees."¹³⁶ The standard for the award of attorneys' fees is high and difficult to meet. Several cases heard by the court of appeals in the last year helped to develop the threshold used in Indiana.

In *Gertz v. Estes*,¹³⁷ two homeowners were involved in a neighbor dispute over the harassing actions committed by one of the parties.¹³⁸ The accused neighbor (the "homeowner") had applied for and received a permit for a seven-foot tall fence, but instead erected a fence standing eight feet tall and spanning 720 feet.¹³⁹ The fence was emblazoned with the large phrases of "NO CLIMBING" and "NO TRESSPASSING" and contained "thousands of protruding nails."¹⁴⁰ The homeowner also installed a public address system, used to shout insulting remarks at the neighbor, and positioned surveillance cameras around the house to view the adjoining neighbors' property.¹⁴¹ The neighbor sued

130. *Id.* at *1.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at *2.

135. *Id.*

136. IND. APP. R. 66(E).

137. 922 N.E.2d 135 (Ind. Ct. App. 2010).

138. *Id.* at 136.

139. *Id.*

140. *Id.* (quoting *Gertz v. Estes*, 879 N.E.2d 617, 621 (Ind. Ct. App. 2008)).

141. *Id.*

the homeowner, alleging that the fence constituted a “spite fence” under Indiana Code section 32-26-10-1 to -2,¹⁴² and alleging the public address system and cameras were a nuisance.¹⁴³ The trial court found the fence to be in violation of the statute and the homeowner’s conduct to be a nuisance.¹⁴⁴ After receiving an order to remove the fence, the homeowner only removed the top foot of the fence and continued the harassing behavior.¹⁴⁵ The neighbor filed a petition to show cause, and the trial court found that the fence continued to be a nuisance before the offending neighbor appealed.¹⁴⁶

On appeal, the neighbor alleged that the homeowner’s appeal was pursued in bad faith and was of a frivolous nature, and he sought attorneys’ fees pursuant to Appellate Rule 66(E).¹⁴⁷ While the conduct of the homeowner did constitute harassment, and the homeowner’s brief failed to fully comply with the Appellate Rules, the court held that the appellee “failed to show that they are entitled to the extraordinary remedy of modification of the trial court’s judgment.”¹⁴⁸ The court acknowledged that the homeowner’s brief failed to fully comply with the Appellate Rules but stated that because the arguments were not “utterly devoid of all plausibility” or “written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court,” an award for fees was not proper.¹⁴⁹ Though this standard is high, the court has awarded appellate fees in certain cases.

In *Poulard v. LaPorte County Election Board*,¹⁵⁰ the winner of a local election tirelessly petitioned the court system for remedy against the local election board when he believed his opponent, who lost the election, was not a resident of

142. IND. CODE § 32-26-10-1 to -2 (2011) provides that a fence erected higher than six feet for the malicious “purpose of annoying the owners or occupants of adjoining property[] is considered a nuisance,” and the injured party may seek damages, abatement, or other preventative remedies.

143. *Gertz*, 922 N.E.2d at 136.

144. *Id.* at 136-37.

145. *Id.* at 137.

146. *Id.* at 137-38.

147. *Id.* at 138.

148. *Id.*; see also *Indianapolis City Market Corp. v. MAV, Inc.*, 915 N.E.2d 1013, 1026 (Ind. Ct. App. 2009) (denying an award of appellate attorneys’ fees where the appellee argued that the City Market failed to appeal the declaratory judgment within thirty days).

149. *Gertz*, 922 N.E.2d at 138-39. The court cited *Potter v. Houston*, 847 N.E.2d 241, 249 (Ind. Ct. App. 2006), which noted that there are two forms of bad faith claims relating to appellate attorneys’ fees: those that are substantive and those that are procedural. Substantive claims show that the “appellant’s contentions and arguments are utterly devoid of all plausibility,” while procedural bad faith claims

occur[] when a party flagrantly disregards the form and content requirements of the rules of appellate procedure, omits and misstates relevant facts appearing in the record, and files briefs written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court.

Id.

150. 922 N.E.2d 734 (Ind. Ct. App. 2010).

the town for which he was running.¹⁵¹ Despite numerous rulings against him, Poulard continued to appeal the court's decisions.¹⁵² The Indiana Court of Appeals, anxious to put an end to Poulard's litigious actions, used strong language in reminding him that Appellate Rule 66(E) should only be awarded in rare situations, stating:

While we are cognizant of the chilling effect that an award of appellate damages can have on litigants, this case is an example of when a chilling effect is necessary to put an end to the matter. Poulard has maintained this cause of action in a manner calculated to require the needless expenditure of time and resources by the Election Board, the trial court, and this [c]ourt.¹⁵³

Hence, in certain circumstances, attorneys' fees incurred during an appeal will be awarded pursuant to Appellate Rule 66(E) as the result of malicious conduct.¹⁵⁴

III. COURT GUIDANCE FOR APPELLATE PRACTITIONERS

The court of appeals offers that in Indiana, "[w]e ask for two basic things from appellate practitioners in this state: compliance with the Indiana Rules of Appellate Procedure and adherence to fundamental standards of professionalism."¹⁵⁵ A strict understanding of the Appellate Rules can go a long way in ensuring an appellate practitioner's good standing with the Indiana appellate courts. Similarly, conducting oneself in a professional manner at all times will also make the life of an appellate lawyer easier. But not only the outward appearance is paramount to the practice of law. The briefs and filings made by an attorney are a direct reflection of that individual's standards and practices and are not overlooked by the courts.

A. Know the Importance of Accurate and Specific Citations

Appellate Rule 46(A)(8)(a) provides that any argument made in the appellant's brief "must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the [a]ppendix or parts of the [r]ecord on [a]ppeal relied on, in accordance with Rule 22."¹⁵⁶ The requirement for accurate citations is important for reasons beyond adding credible support to an argument.

151. *Id.* at 736.

152. *Id.*

153. *Id.* at 738.

154. Appellate fees may also be available under statute. *See Wells Fargo Ins., Inc. v. Land*, 932 N.E.2d 195, 204 (Ind. Ct. App. 2010) (holding that appellate fees may be available under IND. CODE § 22-2-5-2 (2011)) (citing *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 705-06 (Ind. 2002)).

155. *Steve Silveus Ins., Inc. v. Goshert*, 873 N.E.2d 165, 172 (Ind. Ct. App. 2007).

156. IND. APP. R. 46(A)(8)(a).

As the court pointed out in *Vandenburgh v. Vandenburgh*,¹⁵⁷ once a judicial body is forced to locate the supporting material for an argument and assume its utility, the court takes on the role of an advocate and no longer acts as an adjudicator.¹⁵⁸ An argument that is not supported by the proper citation is thus waived for appellate review.¹⁵⁹

B. Arguments May Be Waived if Not Properly Expressed in Briefs

In *Chapo v. Jefferson County Plan Commission*,¹⁶⁰ Jefferson County (“the County”) filed a 2004 notice of zoning violation against Chapo, alleging that she had built a residence on her property without obtaining the proper building permit.¹⁶¹ The County waited until almost three years had passed to file a verified complaint for permanent injunction against Chapo for building the residence.¹⁶² Days later, Chapo filed her response and indicated that she had not built the residence described in the County’s complaint.¹⁶³ After several weeks had passed, the County acknowledged that the property described in the complaint listed the wrong address and that it intended to file an amended complaint giving the correct address of the property in violation.¹⁶⁴ The County failed to file the amended complaint, and after more than a year, Chapo moved to dismiss the complaint for failure to prosecute pursuant to Indiana Trial Rule 41(E).¹⁶⁵ Chapo’s motion was granted with prejudice, and Chapo thereafter filed a motion for costs and fees associated with defending the dismissed action.¹⁶⁶ The trial court declined to grant Chapo’s motion for fees, and after a motion to correct error was denied, she appealed.¹⁶⁷

In *Chapo*, the court of appeals noted that in the County’s “summary of the argument” section of its brief, it argued that the award of fees would be punitive in nature, and as a governmental entity, it should be immune from such judgments.¹⁶⁸ The County failed, however, to provide reference to authority in

157. 916 N.E.2d 723 (Ind. Ct. App. 2009).

158. *Id.* at 726 n.2 (“We prefer to decide cases on the merits, but when flaws in a brief require us to become advocates for a party, a line must be drawn.”); *see also* *Young v. Butts*, 685 N.E.2d 147, 151 (Ind. Ct. App. 1997) (“A court which must search the record and make up its own arguments because a party has not adequately presented them runs the risk of becoming an advocate rather than an adjudicator.”).

159. *Id.* at 729 (citing *Watson v. Auto Advisors, Inc.*, 822 N.E.2d 1017, 1027 (Ind. Ct. App. 2005)).

160. 926 N.E.2d 504 (Ind. Ct. App. 2010).

161. *Id.* at 506-07.

162. *Id.* at 507.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 510 n.4.

support of this argument, and thus, the court waived its application.¹⁶⁹ The court stated, “Because Jefferson County fails to make a cogent argument, supported by citations to authorities and statutes, we find its contention waived.”¹⁷⁰ If a party plans to utilize an argument on appeal, it should express the argument not only in the statement of the argument section, but also in the body of the brief, complete with supporting authority and citations to avoid the court deeming the argument waived.

C. Review Appellate Rules Prior to Filing in Order to Prevent Reminders from Appellate Courts

As discussed in last year’s appellate survey article, the appellate courts have little tolerance for briefs filed that do not comply with the procedures set forth in the Appellate Rules.¹⁷¹ In several decisions during this reporting period, the court of appeals further reminded attorneys of their duty to comply with these rules. One notable example comes from *Kentucky National Insurance Co. v. Empire Fire & Marine Insurance Co.*,¹⁷² in which the appellant failed to include a statement of issues or a statement of case within its brief and similarly left out the section detailing the standard of review.¹⁷³ The court reminded appellant’s counsel of his “professional obligation” to comply with Appellate Rules 46(A)(3), 46(A)(5), and 46(A)(8)(b).¹⁷⁴ Later, in response to counsel’s failure to include a designation of evidence in a motion for summary judgment, the court recalled the Indiana Supreme Court’s decision in *Filip v. Block*,¹⁷⁵ saying:

Here, Kentucky National’s motion for summary judgment did not “recite where the designation of evidence is to be found in the accompanying papers.” Nor did Kentucky National’s memorandum in support of its motion recite where the designation of evidence is to be found. We remind Kentucky National’s counsel that the Indiana Supreme Court has held that “the courts and opposing parties should not be required to flip from one document to another to identify the evidence a party claims is relevant to its motion. Rather, the entire designation must be in a single

169. *Id.*

170. *Id.* (citing IND. APP. R. 46(A)(8)(a), (B)(2)); *see also* Spaulding v. Harris, 914 N.E.2d 820, 833 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 788 (Ind. 2010) (“A party generally waives any issue for which it fails to develop a cogent argument or support with adequate citation to authority and portions of the record.” (citation omitted)).

171. *See* Babb et al., *supra* note 24, at 597-601.

172. 919 N.E.2d 565 (Ind. Ct. App. 2010).

173. *Id.* at 569 n.1.

174. *Id.* IND. APP. R. 46(A)(3) requires a statement of supreme court jurisdiction when an appeal is taken directly to the Indiana Supreme Court. IND. APP. R. 46(A)(5) describes what must be briefly described within the statement of the case. IND. APP. R. 46(A)(8)(b) demands that the argument section of an appellant’s brief “include for each issue a concise statement of the applicable standard of review.”

175. 879 N.E.2d 1076 (Ind. 2008).

place, whether as a separate document or appendix or as a part of a motion or other filing.”¹⁷⁶

Appellate practitioners must adhere to the Appellate Rules governing the contents of motions, briefs, and appendices prior to filing such motions in order to avoid an unwelcome reminder by the appellate court. The rules can be found in Titles VI, VII, and VIII of the Indiana Rules of Appellate Procedure.

IV. INDIANA SUPREME COURT

A. Case Data from the Indiana Supreme Court

In total, during the 2010 fiscal year,¹⁷⁷ the supreme court disposed of 920 cases and issued 169 majority opinions and published dispositive orders.¹⁷⁸ The case makeup was much different than that of the previous fiscal year. Last year, approximately 52% of the cases heard were criminal; thirty percent were civil cases; 11% were attorney discipline cases; 3% were original actions; and fewer than 1% were tax or judicial discipline cases.¹⁷⁹ There was a large jump in attorney discipline cases this term, making up 42% of the majority opinions and published dispositive orders.¹⁸⁰ Approximately 26% of this year’s opinions were criminal cases; 25% were civil; about 2% were original actions; 1% were certified questions; and the final percentage came from judicial discipline, Indiana Board of Law Examiners, mandate of funds, and other cases.¹⁸¹ The court heard oral argument in seventy-five cases; with thirty-five coming from criminal cases, thirty-eight coming from civil cases, and two from certified questions.¹⁸²

B. The Indiana Supreme Court Welcomes a New Justice

In September of 2010, Justice Theodore R. Boehm retired from the Indiana Supreme Court, leaving open the seat he had occupied since his appointment in 1996 by then-Governor Evan Bayh.¹⁸³ His retirement marked “the first change in the [c]ourt’s membership in almost eleven years, by far the longest record of such continuity in Indiana history.”¹⁸⁴ Justice Boehm authored more opinions

176. *Ky. Nat’l Ins. Co.*, 919 N.E.2d at 573 n.14 (quoting *Filip*, 879 N.E.2d at 1081).

177. The supreme court’s 2010 fiscal year ran from July 1, 2009 through June 30, 2010. See IND. SUPREME COURT, 2009-2010 ANNUAL REPORT 1 (2010), available at <http://www.in.gov/judiciary/supremeadmin/docs/0910report.pdf> [hereinafter 2010 SUPREME COURT REPORT].

178. *Id.* at 43-44.

179. See IND. SUPREME COURT, 2008-2009 ANNUAL REPORT 43 (2009), available at <http://www.in.gov/judiciary/supremeadmin/docs/0809report.pdf>; see also Babb et al., *supra* note 24, at 601.

180. See 2010 SUPREME COURT REPORT, *supra* note 177, at 44.

181. *Id.*

182. *Id.* at 45.

183. *Id.* at 7.

184. *Id.*

than any of his colleagues during his time on the bench, and his contributions to the Indiana judicial system are greatly appreciated.¹⁸⁵

On October 18, 2010, Justice Steven David was appointed by Governor Mitch Daniels to replace Justice Boehm and become the 106th justice of the Indiana Supreme Court.¹⁸⁶ Justice David's career prior to his supreme court appointment included time spent as corporate counsel, a privately practicing attorney, and a military lawyer before serving as a Boone County circuit court judge.¹⁸⁷ Justice David graduated *magna cum laude* from Murray State University before earning his law degree from Indiana University School of Law—Indianapolis.¹⁸⁸ While serving as a judge in Boone County, he presided over more than sixty jury trials in criminal, civil, and military matters; he has also testified before the Indiana General Assembly and the United States Congress on juvenile law and national security issues.¹⁸⁹

CONCLUSION

This year marked another opportunity for the Indiana appellate courts to continue shaping the rules and practices of appellate procedure in our jurisdiction. In the decade since the redrafting of the Appellate Rules, the courts' appellate decisions and ordered amendments have enhanced the efficiency and benefit of our judicial system for the citizens, bench, and bar of Indiana.

185. *Id.*

186. See James F. Maguire, *Supreme Court Welcomes Justice Steven David*, IND. CT. TIMES, Dec. 1, 2010, available at <http://indianacourts.us/times/2010/12/supreme-court-welcomes-justice-steven-david>.

187. *Id.*

188. *Id.*

189. *Id.*

RECENT DEVELOPMENTS IN INDIANA BUSINESS AND CONTRACT LAW

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During the survey period,¹ Indiana's courts rendered several significant decisions, which impact businesses as well as their owners, officers, directors, and shareholders. These developments are discussed herein and are of interest to business litigators and corporate transactional lawyers, as well as business owners and in-house counsel.

I. DISSENTERS' RIGHTS, APPRAISAL, AND "FAIR VALUE"

In *Lees Inns of America, Inc. v. William R. Lee Irrevocable Trust*,² the Indiana Court of Appeals held that, in determining the fair value of a dissenter's shares under Indiana's Dissenters' Rights Statute (DRS),³ it was appropriate for experts valuing the shares to consider the company's future plans and prospects, including the nature of the enterprise, its business plans, and its earnings prospects.⁴ The court of appeals also held that the trial court was qualified to consider complex business valuations without the assistance of an appointed special master or expert.⁵

The trial court proceedings in *Lees Inns*, which spanned over eight years, involved an Indiana-based hotel chain.⁶ Following a merger pursuant to which the majority shareholder in the corporation that owned the hotel chain bought out the interest of the sole minority shareholder, the minority shareholder initiated appraisal proceedings under the DRS. The minority shareholder dissented to the merger and alleged that the majority shareholder had breached its fiduciary duties through a number of self-motivated transactions designed to benefit itself to the detriment of the value of the minority owner's stock.⁷

A. Business Valuation "Must" Consider Future Plans and Prospects

At trial, the parties offered three valuations for the trial court's consideration: (1)

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1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period, i.e., from October 1, 2009 through September 30, 2010.

2. 924 N.E.2d 143 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 821 (Ind. 2010).

3. IND. CODE § 23-1-44-1 through -20 (2011).

4. *Lees Inns*, 924 N.E.2d at 157.

5. *Id.* at 154.

6. *Id.* at 147.

7. *Id.* at 148-50.

the valuation used to value the payment to the minority shareholder at the time of the merger, based on financial information from the corporation as well as general market data, industry information, and other relevant information; (2) a valuation offered by the minority shareholder, utilizing a discounted cash flow approach, which incorporated a real estate appraisal that assumed the company's income would increase in the future and considered the company's future business plans and prospects (including a plan to expand by three hotels and to acquire another chain, thereby significantly cutting expenses); and (3) a valuation offered by the company, using historical results to determine the value of the owners' capital.⁸

The trial court adopted the minority shareholder's appraisal and entered judgment in the minority shareholder's favor in the amount of more than \$7.5 million (the difference between the amount paid to the minority shareholder at the time of the merger and the share value determined at trial, plus interest, expenses, and attorney fees).⁹ The majority shareholder appealed, arguing, among other things, that "the appraisal was based on speculation" in that it assumed future expansion and reduction in expenses through future acquisition of another hotel chain.¹⁰ The primary issue on appeal, then, was whether the trial court's determination of "fair value" under the DSR was supported by admissible evidence.

"Fair value" under the DSR "is defined as the value of the shares 'immediately before' the sale."¹¹ "'Fair value' contemplates that the shareholders will be fairly compensated, which may or may not be the same as the market's judgment regarding the stock's value."¹² Recognizing that "there is no case law in Indiana specifying how dissenting shareholders' shares are to be appraised,"¹³ the court in *Lees Inn* looked to other jurisdictions and found that "a number of jurisdictions have determined that *future elements susceptible of proof as of the merger date may be considered*."¹⁴ The court in *Lees Inn* quoted at length, and with approval, a Delaware Supreme Court decision, as follows:

The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern. By value of the stockholder's proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock which has been taken by the merger. In determining what figure represents this true or intrinsic value,

8. *See id.* at 150-52 (describing the three valuation methods in greater detail).

9. *Id.* at 152-53.

10. *Id.* at 155.

11. *Id.* (citing IND. CODE § 23-1-44-3 (2011); *Galligan v. Galligan*, 741 N.E.2d 1217, 1224 (Ind. 2001)).

12. *Id.* (citing *Trietsch v. Circle Design Grp., Inc.*, 868 N.E.2d 812, 820 n.4 (Ind. Ct. App. 2007)).

13. *Id.*

14. *Id.* (emphasis added) (citations omitted).

the appraiser and the courts *must* take into consideration all factors and elements which reasonably might enter into the fixing of value. Thus, market value, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of the merger and which throw any light on future prospects of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholder[']s interest, but *must* be considered by the agency fixing the value.¹⁵

The court in *Lees Inn* explained that “*all* elements of a corporation’s fair value must be considered on the valuation date, and elements of future value *that are not attributable to the merger itself* are properly considered in the calculation of fair value.”¹⁶ In affirming the trial court’s decision, the court of appeals concluded that “it was appropriate for the experts valuing [the company] . . . to consider the company’s future plans and prospects.”¹⁷

B. Trial Court Qualified to Evaluate Complex Business Valuations

The majority shareholder in *Lees Inns* also argued that the trial court erred in declining to “appoint a special master or expert to assist in addressing the valuation issues of the business.”¹⁸ Specifically, the majority shareholder argued that the “technical disagreements” among the valuations, which amounted to differences of “millions of dollars . . . in the bottom line valuation” were “outside the everyday knowledge of most judges.”¹⁹ The court of appeals found that the majority shareholder’s argument, “which presuppose[d] that a trial court does not have the ability to analyze expert testimony relating to the valuation of a business, [was] unavailing.”²⁰

II. DERIVATIVE SUITS AND “DISINTERESTED DIRECTOR” STANDARD

In *In re ITT Derivative Litigation*,²¹ the Indiana Supreme Court, on a certified question of state law from the United States District Court for the Southern District of New York, held that “the same ‘disinterestedness’ standard applies in

15. *Id.* at 156 (emphases added) (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983)).

16. *Id.* (second emphasis added) (applying IND. CODE § 23-1-44-3, which provides that fair value means “the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable”).

17. *Id.* at 157. The court continued, “Therefore, the trial court properly considered the future prospects of [the company] including the nature of the enterprise, its business plans, and earnings prospects in arriving at the stock’s fair value.” *Id.*

18. *Id.* at 154.

19. *Id.*

20. *Id.*

21. 932 N.E.2d 664 (Ind. 2010).

both the demand futility context of Indiana Code [section] 23-1-32-2 and the investigatory committee procedure of Indiana Code [section] 23-1-32-4.”²² According to the court in *ITT*, “[i]n both instances, the shareholders must show that the directors face a substantial likelihood of personal liability on the claims to establish that a director is ‘not disinterested.’”²³

The underlying case was a derivative action brought by ITT shareholders alleging that ITT’s directors breached their fiduciary duties by failing to monitor and supervise the management of a unit that allegedly “exported military technology to various countries in violation of U.S. State Department restrictions on the export of technical data.”²⁴ One of the shareholders made no demand on ITT’s board to pursue the demand, arguing that “demand should be excused as futile.”²⁵ The federal district court held that the shareholder failed to show that a majority of the director-defendants “face[d] a substantial likelihood of liability for consciously failing to fulfill their fiduciary duties.”²⁶ The other shareholder, “on the other hand, did make a demand on ITT’s board to pursue the asserted claims.”²⁷ In response, the board appointed a special litigation committee (SLC) to decide if the corporation should pursue the claims.²⁸ The trial court, however, concluded that the “three independent, outside directors appointed to the [SLC] were not ‘disinterested’ for the purposes of Indiana Code § 23-1-32-4.”²⁹ The trial court reasoned that “unless it could be shown that the claim against the SLC was frivolous, the SLC’s work must be disregarded.”³⁰ In other words, the district court “found that the standard under Indiana Code § 23-1-32-4 was different, ‘more plaintiff-friendly than the much more onerous standard for showing a lack of disinterestedness in the demand futility context.’”³¹ On that basis, the defendant-directors’ motion to dismiss was denied.³²

Pursuant to Indiana Appellate Rule 64, the New York district judge certified the following question for decision by the Indiana Supreme Court:

What standard should be applied in determining whether a director is “disinterested” within the meaning of Indiana Code § 23-1-32-4(d), and more specifically, is it the same standard as is used in determining

22. *Id.* at 671.

23. *Id.*

24. *Id.* at 666.

25. *Id.*

26. *Id.* (citation omitted).

27. *Id.*

28. *Id.*

29. *Id.* at 667.

30. *Id.* The court based its conclusion on IND. CODE § 23-1-32-4(d)(1) (2011), “which provides that directors named in a derivative suit remain ‘disinterested’ if they are named in the action ‘only on the basis of a frivolous or insubstantial claim or for the sole purpose of seeking to disqualify the director . . . from serving on the committee.’” *Id.*

31. *In re ITT Derivative Litigation*, 932 N.E.2d at 667 (citation omitted).

32. *Id.*

whether a director is disinterested for purposes of excusing demand on the corporation's directors under Federal Rule of Civil Procedure 23.1 and *Rales v. Blasband*?³³

Regarding Indiana's standard on demand futility, the court in *ITT* explained that "Indiana law requires that potential derivative plaintiffs make a demand on the board of directors that it pursue the potential claims, unless the demand would be futile."³⁴ The court continued, "[t]o excuse demand, a court must determine whether the particularized factual allegations create a reasonable doubt that the board could have properly exercised disinterested business judgment in responding to a demand."³⁵ According to the court in *ITT*, a director is "interested" for purposes of a futility argument "if a derivative claim poses a significant risk of personal liability for the director."³⁶

Regarding the standard for determining whether a SLC director is disinterested, Indiana Code section 23-1-32-4(d)(1) provides that directors named in a derivative suit remain "disinterested" if they are named in the action "only on the basis of a frivolous or insubstantial claim or for the sole purpose of seeking to disqualify the director . . . from serving on the committee."³⁷ Because the district court found that the claims against the SLC directors were not "frivolous," it ruled that the SLC's determination was not "conclusive."³⁸

The Indiana Supreme Court in *ITT*, however, took a "different view."³⁹ The court in *ITT* concluded that the Indiana Business Corporation Law "requires the application of a consistent standard to determine whether directors are considered 'disinterested' in both the SLC and demand futility contexts."⁴⁰ The court recognized that

under subsection (d)(1) [applicable to SLC directors], directors or other persons named in a derivative suit remain "disinterested" if they were joined "only on the basis of a frivolous or insubstantial claim or for the sole purpose of seeking to disqualify the director or other person from serving on the committee."⁴¹

But the court explained that by applying a "frivolous" standard in the SLC context, the plaintiffs (and the district court) did "not give due consideration to

33. *Id.* at 665-66 (citation omitted).

34. *Id.* at 668 (citation omitted).

35. *Id.* (citation omitted).

36. *Id.* (citation omitted) (noting that "[b]eing deemed 'interested' requires more than a 'mere threat' of personal liability—there must be 'a substantial likelihood' of liability for the director." (citation omitted)).

37. *Id.* at 667 (quoting IND. CODE § 23-1-32-4(d)(1) (2011)).

38. *Id.* at 669.

39. *Id.*

40. *Id.*

41. *Id.* at 670.

[the term] ‘insubstantial.’”⁴²

Applying statutory interpretation principles and considering the policies underlying the Indiana Business Corporation Law, the Indiana Supreme Court concluded the same standard—that “*shareholders must show that the directors face a substantial likelihood of personal liability on the claims*”⁴³—applies in both the demand futility and the SLC contexts.⁴⁴

III. SECURITIES REGULATION AND LITIGATION

A. Note as a “Security” and the “Family Resemblance” Test

In *Reinhart v. Boeck*,⁴⁵ the Indiana Court of Appeals analyzed the “family resemblance” test for determining whether a “note” constitutes a “security” under the Indiana Uniform Securities Act (the “Act”), concluding that the notes at issue in the case were “securities” and that an individual who solicited the plaintiff’s investment was jointly and severally liable with the seller of the unregistered securities.⁴⁶

The plaintiff in *Reinhart* “invested” \$197,000 in a “phony” real estate business—Thomas Real Estate Group, Inc. (“TRG”).⁴⁷ The plaintiff’s investment in TRG was solicited by the entity’s owner, Thomas, as well as another individual, Reinhart, who was tasked with soliciting investments for the business.⁴⁸ The investment was effectuated through two loans, documented by promissory notes, in the amounts of \$125,000 and \$72,000.⁴⁹ The plaintiff was promised returns on his investments of 20% and 33%, respectively.⁵⁰ The plaintiff was repaid only \$60,000.⁵¹ The plaintiff sued Reinhart alleging, among other theories, derivative liability under the Act for Thomas’s unlawful and fraudulent sale of securities.⁵²

The threshold question in establishing liability under the Act was whether the two promissory notes were “securities.”⁵³ “The Act defines ‘security’ broadly and includes an ‘illustrative list’ of numerous items, but it begins its litany of examples by stating that ‘[s]ecurity means a note . . . [or] evidence of indebtedness.’”⁵⁴ The term “security” is “ordinarily used as a synonym for

42. *Id.*

43. *Id.* at 671 (emphasis added).

44. *Id.*

45. 918 N.E.2d 382 (Ind. Ct. App. 2009).

46. *Id.* at 392-96, 400-01.

47. *Id.* at 387-88.

48. *Id.* at 384-85.

49. *Id.* at 387-88.

50. *Id.* at 388.

51. *Id.*

52. *Id.* at 389.

53. *Id.* at 392.

54. *Id.* (quoting IND. CODE § 23-2-1-1(k) (2011)).

‘investment.’”⁵⁵ “The ‘investment of money with the expectation of profit through the efforts of other persons[] is within the Act’s definition of security.’”⁵⁶ In reaching its conclusion that the notes were “securities,” the court in *Reinhart* analyzed its earlier decision in *Manns v. Skolnik*,⁵⁷ in which the court of appeals concluded that a “compensation agreement” constituted a “note” and was therefore a “security” within the meaning of the Act.⁵⁸ The court in *Reinhart* outlined the “family resemblance” test applied by the court in *Manns* as follows:

The leading federal test in this area is the “family resemblance” test enumerated by *Reves v. Ernst & Young*. The “family resemblance” test begins with the presumption that a note constitutes a security. This presumption may be rebutted only by a showing that the note bears a “strong resemblance” to one of seven enumerated instruments deemed not to be “securities” within the meaning of the statute. The seven categories include: (1) a note delivered in consumer financing, (2) a note secured by a mortgage on a home, (3) a short-term note secured by a lien on a small business or some of its assets, (4) a note evidencing a “character” loan to a bank customer, (5) a short-term note secured by an assignment of accounts receivable, (6) a note which simply formalizes an open-account debt incurred in the ordinary course of business, or (7) a note evidencing loans by commercial banks for current operations.

The *Reves* court set forth the following four factors to use in determining whether the instrument bears a “strong resemblance” to any of these seven categories: (1) the motivations that would prompt a reasonable seller and buyer to enter into the transaction, (2) the “plan of distribution” of the instrument, (3) the reasonable expectations of the investing public, and (4) the existence of another regulatory scheme significantly reducing the risk of the instrument.⁵⁹

The court in *Reinhart* agreed with the trial court in finding that the notes in question were “securities.”⁶⁰ The court explained that “the notes here were evidence of TRG’s obligation to pay [the plaintiff] in the future in exchange for [the plaintiff’s] . . . wire transfers.”⁶¹ Therefore, under *Manns*, “they are presumed to be securities.”⁶²

Reinhart attempted to rebut the presumption that the notes were securities by arguing that they bore “a ‘strong resemblance to an instrument deemed not to be

55. *Id.* (quoting *Holloway v. Thompson*, 42 N.E.2d 421, 424 (Ind. Ct. App. 1942)).

56. *Id.* (quoting *SEC v. Universal Serv. Ass’n*, 106 F.2d 232, 237 (7th Cir. 1939)).

57. 666 N.E.2d 1236 (Ind. Ct. App. 1996).

58. *Id.* at 1245-46.

59. *Reinhart*, 918 N.E.2d at 393 (internal citations omitted) (quoting *Manns*, 666 N.E.2d at 1243-44).

60. *Id.* at 394.

61. *Id.*

62. *Id.*

a security.”⁶³ However, Reinhart failed to identify which of the seven “nonsecurities” the notes purportedly resembled.⁶⁴ The court, therefore, found that he “failed to support his argument with cogent reasoning and waived it.”⁶⁵

Instead, Reinhart argued that the notes were actually loans and were therefore contracts.⁶⁶ The court disagreed, explaining that “notes are not contracts; they are simply evidence of indebtedness.”⁶⁷ The court reasoned that the notes reveal “no consideration, a requirement for a valid contract.”⁶⁸ Furthermore, “[t]o constitute consideration, there must be a benefit accruing to the promisor or a detriment to the promisee.”⁶⁹ In any event, the court explained, even if the notes were evidence of loans and not indebtedness, that alone would not rebut the presumption that the notes were securities.⁷⁰ “‘Loans’ generally are not one of the seven nonsecurities identified in *Reves*.”⁷¹

The court in *Reinhart* also concluded that a “sale” occurred within the meaning of the Act⁷² and that Reinhart was Thomas’ “partner by estoppel,” supporting a claim for joint and several liability under the Act.⁷³ The court therefore affirmed the trial court’s entry of summary judgment in favor of the plaintiff on his claim that Reinhart was “jointly and severally liable under the Act for Thomas’[s] unlawful sale of securities.”⁷⁴

B. Appointment of Receiver over Assets of Wife Who “Materially Aids” Securities Violation

In *Schrenker v. State*,⁷⁵ the Indiana Court of Appeals held as a matter of first impression that evidence was sufficient to show that a registered investment advisor’s wife “aided” in violations of the Indiana Uniform Securities Act (the “Act”), as required to support the appointment of a receiver over her assets.⁷⁶ Marcus and Michelle Schrenker were principals in various investment firms.⁷⁷

63. *Id.* at 395 (citation omitted).

64. *Id.*

65. *Id.* (“Having failed to identify a nonsecurity that the notes might resemble, we do not consider what the motivations of the buyer and seller of the notes may have been.”).

66. *Id.* at 396.

67. *Id.*

68. *Id.*

69. *Id.* (quoting *Jackson v. Luellen Farms, Inc.*, 877 N.E.2d 848, 857 (Ind. Ct. App. 2007)).

70. *Id.*

71. *Id.* The court in *Reinhart* also concluded that a “sale” occurred within the meaning of the Act, and that Reinhart was Thomas’s “partner by estoppel.” *Id.* at 390, 397-400.

72. *Id.* at 397.

73. *Id.* at 390, 397-400.

74. *Id.* at 401.

75. 919 N.E.2d 1188 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 794 (Ind. 2010).

76. *Id.* at 1196.

77. *Id.* at 1190.

Both had been the subjects of an action by the Indiana Securities Commissioner.⁷⁸ Marcus fled the state “with an unknown amount of investor money and/or assets purchased with investor money.”⁷⁹ In the commissioner’s action against the Schrenkers and their companies, the trial court appointed a receiver over Michelle’s assets.⁸⁰ Michelle appealed.

The court of appeals in *Schrenker* recognized that the appointment of a receiver is an “extraordinary and drastic remedy to be exercised with great caution.”⁸¹ Nevertheless, the court affirmed the trial court’s finding that Michelle “materially aided” Marcus in violating the Act through her access to (and withdrawal of at least \$66,500 of investors’ funds from) one of the company bank accounts—a company of which she was the chief financial officer.⁸² Michelle was a principal in the investment firms; the offices were leased to both Marcus and Michelle; Michelle kept the books and was the chief financial officer for the firms; and she was paid \$11,600 per month.⁸³

The court in *Schrenker* recognized that “[t]he conduct necessary to ‘materially aid’ a securities law violation appears to be a question of first impression in Indiana.”⁸⁴ After discussing the Indiana Supreme Court’s decision in *Kirchoff v. Selby*,⁸⁵ the court in *Schrenker* adopted the standard used in *Foley v. Allard*, “which requires a substantial causal connection between the culpable conduct of the alleged aider and abettor and the harm to the plaintiff.”⁸⁶ The court in *Schrenker* held as follows:

[I]t is apparent there was a substantial causal connection between Michelle’s culpable conduct, in the form of withdrawing investor funds

78. *Id.*

79. *Id.* (citation omitted).

80. *Id.* The trial court’s appointment of a receiver was based on that court’s conclusions that Michelle “materially aided” Marcus and his corporations in violating the Act and that she was “‘jointly and severally liable with and to the same extent as’ Marcus and his companies,” due to her position as Chief Financial Officer of the companies. *Id.* at 1192 (citations omitted). The court of appeals in *Schrenker* found that the trial court erred in concluding that Michelle was “‘jointly and severally liable with and to the same extent as’ Marcus” because the statute relied upon by the trial court to support that finding—IND. CODE § 23-19-5-9(d) (2011)—“applie[d] only to private rights of action by a purchaser who is harmed by a violation of the Securities Act.” *Id.* at 1192 n.3.

81. *Id.* at 1191 (quoting *Crippin Printing Corp. v. Abel*, 441 N.E.2d 1002, 1005 (Ind. Ct. App. 1982)). The court noted that “[t]he power to appoint a receiver should be exercised only when it is clear that no other full and adequate remedy exists whereby justice between the parties may be affected and a wrong prevented, and only in a clear case of extreme necessity. Accordingly, the standard by which the appointment can be justified is exceptionally stringent.” *Id.* at 1192 (citation omitted).

82. *Id.* at 1193-96.

83. *Id.* at 1190, 1193.

84. *Id.* at 1195.

85. 703 N.E.2d 644, 651 (Ind. 1998).

86. *Schrenker*, 919 N.E.2d at 1195.

from the [company] account, and the harm the investors suffered in the form of lost money. Therefore, the court did not err in concluding Michelle materially aided Marcus in violating the Securities Act. The appointment of a receiver was not an abuse of discretion, and we affirm.⁸⁷

IV. PIERCING THE CORPORATE VEIL

In *Longhi v. Mazzoni*,⁸⁸ the Indiana Court of Appeals analyzed Indiana's requirements for piercing the corporate veil of a limited liability company to reach the assets of a member and concluded that sufficient evidence existed to pierce the corporate veil on grounds of both inadequate capitalization and fraud.⁸⁹

The plaintiffs in *Mazzoni* paid a \$50,000 earnest money deposit for the construction of a home.⁹⁰ The defendant, Longhi, was a family friend of the plaintiffs and an "architect whose role in the [p]roject was to be the representative on-site, assist with sales, meet with customers and help them with the selection process of their finishes, and serve as a liaison between customers and the construction superintendent for the [p]roject."⁹¹ Construction was never commenced on the home, and despite repeated demands, the plaintiffs were never repaid their \$50,000 deposit.⁹² The plaintiffs filed suit against the construction company (a limited liability company) and Longhi, "alleging that Longhi was personally liable for the receipt, escrow, and disposition of the . . . deposit."⁹³ The trial court found Longhi personally liable under veil-piercing and quantum meruit theory.⁹⁴ Longhi appealed.

First, the court of appeals addressed the corporate veil-piercing issue, noting that "[c]ourts have pierced the corporate veil of limited liability companies."⁹⁵ Further, "courts have pierced a corporate veil to find an individual liable even where the individual was not a shareholder/member of a corporation/company."⁹⁶

87. *Id.* at 1196.

88. 914 N.E.2d 834 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 788 (Ind. 2010).

89. *Id.* at 846.

90. *Id.* at 836.

91. *Id.*

92. *Id.* at 837-38.

93. *Id.* at 838.

94. *Id.*

95. *Id.* at 839 n.3 (citing *Four Seasons Mfg., Inc. v. 1001 Coliseum, LLC*, 870 N.E.2d 494, 504-06 (Ind. Ct. App. 2007)).

96. *Id.* (citing *Fairfield Dev., Inc. v. Georgetown Woods Sr. Apartments Ltd. P'ship*, 768 N.E.2d 463, 473 (Ind. Ct. App. 2002) (imposing liability on an individual who was not a shareholder of a corporation because it promoted injustice that the individual was the principal figure in the corporation's dealings with the appellee and was intimately involved in the corporation's project); *Hart v. Steel Prods., Inc.*, 666 N.E.2d 1270, 1276-77 (Ind. Ct. App. 1996) (imposing liability on the agent of a corporation because the agent's conduct would work an injustice)).

The court then enumerated the factors for consideration in determining whether the corporate veil should be disregarded:

(1) undercapitalization; (2) absence of corporate records; (3) fraudulent representation by corporation shareholders or directors; (4) use of the corporation to promote fraud, injustice or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; or (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form.⁹⁷

“Inadequate capitalization,” for purposes of veil-piercing analysis, means “capitalization very small in relation to the nature of the business of the corporation and the risks attendant to such businesses.”⁹⁸ Further, “[t]he adequacy of capital is measured by evaluating the amount of capital the company had at the time of its formation, unless the company at some point substantially expands the size or nature of its business with an attendant increase in business hazards.”⁹⁹

The court in *Longhi* found that sufficient evidence was presented at trial to support the trial court’s finding that “based on bank requirements and financial projections the developers needed \$400,000” and that the company “did not have the amount of capital needed to finance the [p]roject based upon its lender’s capital requirements and the in-depth market analysis that it had performed at the time of [the company’s] formation or the [p]roject’s initiation.”¹⁰⁰ The court affirmed the trial court’s conclusion that the company and the project were undercapitalized, supporting the decision to pierce the corporate veil to reach Longhi personally.¹⁰¹

The court also found that the evidence supported the trial court’s decision to pierce the corporate veil based on Longhi’s perpetration of fraud.¹⁰² Specifically, Longhi testified that the plaintiffs’ \$50,000 was an “investment in the [p]roject.”¹⁰³ The plaintiffs testified that Longhi never told them that their money was an investment, but rather that the \$50,000 was a down payment on the house.¹⁰⁴ The purchase agreement also provided that the payment constituted an earnest money deposit.¹⁰⁵ These and other findings by the trial court supported the conclusion regarding Longhi’s use of the company to promote fraud.¹⁰⁶

97. *Id.* at 839 (quoting *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994)).

98. *Id.* at 840 (citing *Cnty. Care Centers, Inc. v. Hamilton*, 774 N.E.2d 559, 565 (Ind. Ct. App. 2002)).

99. *Id.* (citation omitted).

100. *Id.* at 841.

101. *Id.*

102. *Id.* at 843-44.

103. *Id.* at 842.

104. *Id.*

105. *Id.*

106. *See id.* at 843-44. The court in *Longhi* also affirmed the trial court’s decision to award

V. NON-COMPETITION COVENANTS

In *Zimmer, Inc. v. Davis*,¹⁰⁷ the Indiana Court of Appeals affirmed the trial court's denial of a preliminary injunction based on a "balance of the harms" analysis.¹⁰⁸ Zimmer sought a preliminary injunction against its former employee, Davis, "to enforce the confidentiality, non-solicitation, and non-competition provisions of their [e]mployment [a]greement."¹⁰⁹ The trial court denied the request, and Zimmer appealed, arguing that the trial court erred in finding that "the balance of harm tipped in favor of the denial of injunctive relief."¹¹⁰

After reciting the trial court's findings of fact and conclusions relevant to the "balance of the harms" element, the court in *Zimmer* discussed its earlier decisions in *Gleeson*¹¹¹ and *McGlothen*,¹¹² on the issue.¹¹³ The court explained that in *Gleeson*, "the employee freely entered into the non-competition agreement, voluntarily terminated her employment, sought a new job, and then attempted to hide her competitive activities from the employer."¹¹⁴ The court in *Gleeson* found that the employer's loss of customer goodwill outweighed the harm to the former employee, a "mother of three children, who relied upon a paycheck from her new employer to support herself and her family, and to satisfy financial obligations."¹¹⁵ In *McGlothen*, according to the court in *Zimmer*, the employee "voluntarily left his employment, retained materials from his employment constituting confidential information, actively solicited his former

treble damages in the amount of \$150,000 plus attorney fees under Indiana Code § 34-24-3-1. *Id.* at 846 (citing *Heartland Resources, Inc. v. Bedel*, 903 N.E.2d 1004, 1008 (Ind. Ct. App. 2009); *Harlan Bakeries, Inc. v. Muncy*, 835 N.E.2d 1018, 1037 (Ind. Ct. App. 2005); *Whitaker v. Brunner*, 814 N.E.2d 288, 298 (Ind. Ct. App. 2004); *Johnson v. Naugle*, 557 N.E.2d 1339, 1348 (Ind. Ct. App. 1990)).

107. 922 N.E.2d 68 (Ind. Ct. App. 2010).

108. *Id.* at 74.

109. *Id.* at 70.

110. *Id.* at 69, 71-72. To obtain a preliminary injunction, the moving party has the burden of proving that

- (1) the moving party's remedies at law are inadequate, thus causing irreparable harm pending resolution of the substantive action; (2) the moving party has at least a reasonable likelihood of success on the merits at trial by establishing a prima facie case; (3) the threatened injury to the moving party outweighs the potential harm to the non-moving party resulting from the granting of the injunction; and (4) the public interest would not be disserved.

Id. at 71 (citing *PrimeCare Home Health v. Angels of Mercy Home Health Care, L.L.C.*, 824 N.E.2d 376, 380 (Ind. Ct. App. 2005)).

111. *Gleeson v. Preferred Sourcing, LLC*, 883 N.E.2d 164 (Ind. Ct. App. 2008).

112. *McGlothen v. Heritage Envtl. Servs., LLC*, 705 N.E.2d 1069 (Ind. Ct. App. 1999).

113. *Zimmer*, 922 N.E.2d at 73-74.

114. *Id.* at 73 (citing *Gleeson*, 883 N.E.2d at 178).

115. *Id.* at 73-74 (citing *Gleeson*, 883 N.E.2d at 178-79).

employer's customers . . . and attempted to convince a former co-worker to leave and join the employee at his new place of employ."¹¹⁶ The court in *McGlothen* found that the employer's risk of "severe downsizing and layoffs" outweighed the potential harm to the employee, despite the employee's "age (54), his longevity as an employee in the industry, interference with his ability to earn a livelihood, and [the employee's argument] that the employer was not harmed because the employee had been unsuccessful in his attempts to solicit his employer's customers."¹¹⁷

In affirming the trial court's finding that the balance of harms weighed against entry of a preliminary injunction, the court of appeals explained its reasoning as follows:

Davis's employment was terminated by Zimmer, and Davis did not take any documents or other media containing Zimmer's confidential information with him after his employment was terminated. Davis testified that he has not disclosed any of Zimmer's confidential information in breach of the [e]mployment [a]greement and did not intend to breach the [e]mployment [a]greement.

Furthermore, there was no evidence that Zimmer lost any sales, lost any customers for its products, or lost any consulting surgeons as a result of Davis's employment with [his new employer]. No evidence was presented that anyone at [the new employer] had received confidential information about Zimmer from Davis.¹¹⁸

Regarding potential harm to Davis, the court recognized that "Davis testified that he . . . needed to work to earn a living" and that "certain of Davis's personal expenses increased, including health and life insurance premiums and automobile expenses previously paid for by Zimmer."¹¹⁹ The court in *Zimmer* concluded that the evidence and the reasonable inferences drawn therefrom did not "lead unerringly to a conclusion opposite that reached by the trial court."¹²⁰

VI. SHAREHOLDER AGREEMENTS AND TRANSFER OF SHARES

In *Gatlin Plumbing & Heating, Inc. v. Estate of Yeager*,¹²¹ the court held that a corporation could not "buy back" shares of a deceased shareholder's stock where the corporation failed to exercise its purchase option within one of two "alternative" time periods dictated by the parties' shareholder agreement.¹²² Specifically, the shareholder agreement provided the following:

116. *Id.* at 74.

117. *Id.* (citing *McGlothen*, 705 N.E.2d at 1075).

118. *Id.*

119. *Id.*

120. *Id.*

121. 921 N.E.2d 18 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 797 (Ind. 2010).

122. *Id.* at 23-24.

In the event of the death of any person . . . who is holding shares of stock of this CORPORATION . . . the CORPORATION shall have the option, within sixty (60) days after such decease, or within thirty (30) days after the appointment and qualification of an executor or administrator of the estate of such decedent, to purchase any or all of the shares of stock of such decedent¹²³

One of Gatlin's shareholders died, but no executor or administrator was appointed due to the "minimal value" of the estate.¹²⁴ The decedent-shareholder's heirs petitioned for a transfer of the decedent's shares in Gatlin, and the court granted the petition.¹²⁵ Thereafter, Gatlin filed an objection to the order, arguing that it had a right to purchase the stock until thirty days after appointment of an executor or administrator, which had not occurred.¹²⁶ Gatlin argued that therefore, the thirty-day period should not begin to run until the trial court's order transferring the stock to the heirs.¹²⁷ The trial court disagreed, finding that having failed to exercise its right to purchase the shares within sixty days after death, Gatlin, as an "interested party," could have opened an estate and petitioned for the transfer of the stock within the thirty-day period dictated by the shareholder agreement.¹²⁸

Regarding the shareholder agreement, the court declared, "Provisions of a shareholder agreement that restrict the transfer of stock 'are treated as contracts either between shareholders or between shareholders and the corporation.'"¹²⁹ Moreover, "[r]estrictions on transfer are to be read, like any other contract, to further the manifest intention of the parties."¹³⁰ The court also noted that "[b]ecause they are restrictions on alienation and therefore disfavored, the terms in the restrictions are not to be expanded beyond their plain and ordinary meaning."¹³¹

The court in *Gatlin*, applying the dictionary definitions of the terms "and" and "or," concluded that "the [s]hareholders' [a]greement provided Gatlin with two alternatives."¹³² The court of appeals rejected the company's argument, explaining that Gatlin's argument would have the effect of replacing the word "or" with "and," making the two words "interchangeable."¹³³

123. *Id.* at 21.

124. *Id.*

125. *Id.*

126. *Id.* at 22.

127. *Id.*

128. *Id.*

129. *Id.* at 23 (quoting *F.B.I. Farms, Inc. v. Moore*, 798 N.E.2d 440, 445 (Ind. 2003)).

130. *Id.* (quoting *F.B.I. Farms*, 798 N.E.2d at 445-46).

131. *Id.* (quoting *F.B.I. Farms*, 798 N.E.2d at 446).

132. *Id.* at 24.

133. *Id.*

VII. BUSINESS TORTS

A. Defamation

In *Melton v. Ousley*,¹³⁴ the court of appeals held that statements calling a professional golfer a “cheater” were truthful and therefore not defamatory.¹³⁵ Resolution of the case required some explanation of the PGA of America’s (PGA’s) internal rules and regulations. The PGA maintains a detailed classification system for professional golfers.¹³⁶ The Indiana section of the PGA (“Indiana Section”) runs its own golf tournaments, and participation in many of its tournaments is limited by PGA classification.¹³⁷

After spending some time working in Illinois, plaintiff Melton moved back to Indiana and applied for classification as an “A-6” teaching professional in the Indiana Section.¹³⁸ Defendant Ousley was another professional golfer and Indiana Section member acquainted with Melton.¹³⁹ “Ousley told some other Indiana Section members that Melton was a ‘cheat,’ a ‘cheater,’ and was ‘cheating the system,’” apparently because Melton was playing in Indiana Section tournaments for which he was not eligible.¹⁴⁰ Ousley contacted the executive director of the Indiana Section and later put his concerns in writing.¹⁴¹ In response, the Indiana Section investigated Melton’s employment status; after several attempts, unsuccessful appeals to the national PGA, and more than two years, Melton finally established eligibility as an A-6 teaching professional.¹⁴²

At the same, in response to a cease and desist letter, Ousley’s former counsel wrote a letter to Melton’s counsel.¹⁴³ Among other gems, Ousley’s former counsel wrote, “once a cheater, always a cheater,” and quoted Bob Feller as saying, “You figure they cheat at the ballpark, they’ll cheat on the golf course, they’ll cheat in business, and anything else in life.”¹⁴⁴ Melton filed a complaint against Ousley, alleging defamation and tortious interference with an employment relationship.¹⁴⁵

The court of appeals considered whether summary judgment was appropriate for Ousley on the defamation count.¹⁴⁶ The court evaluated whether Ousley’s

134. 925 N.E.2d 430 (Ind. Ct. App. 2010).

135. *Id.* at 437. The court also considered whether the statements constituted tortious interference with contract. See *infra* notes 172-79 and accompanying text.

136. *Melton*, 925 N.E.2d at 432.

137. *Id.*

138. *Id.* at 432-33.

139. *Id.* at 433.

140. *Id.*

141. *Id.*

142. *Id.* at 433-34.

143. *Id.* at 434-35.

144. *Id.* at 435.

145. *Id.*; see also *infra* notes 172-79 and accompanying text.

146. *Melton*, 925 N.E.2d at 437-40.

statements were true because "truth is a complete defense in civil actions for defamation" so fundamental as to be included in the Indiana Constitution.¹⁴⁷ Ousley's statements to other golf professionals that Melton was a "cheat" were truthful because the designated evidence showed that the statements referred to Melton's PGA classification, and Melton "indisputably was not eligible" to be classified as a teaching professional.¹⁴⁸

Melton attempted to argue that Ousley's statements were defamatory based on "the innuendo, the . . . implications and insinuations" therein, quoting language from *Cochran v. Indianapolis Newspapers*.¹⁴⁹ "But whether a statement in its entirety is susceptible to a defamatory meaning is a *question of law* for a court to decide."¹⁵⁰ The court held that under their "plain and natural meaning," Ousley's comments were not defamatory because they were made in the context of Melton's PGA classification.¹⁵¹

With respect to the statements in Ousley's former counsel's letter, the court held that these statements were not published and therefore could not form the basis of a defamation claim.¹⁵² However, the court went on to conclude that the statements were true, viewed in the context of the entire letter: "Melton is a professional golfer and, therefore, golf is his business. To the extent that the letter implies that he cheats in business, we conclude that such is true."¹⁵³ The court did "observe that the letter is harsh, if not unprofessional."¹⁵⁴

B. *Tortious Interference with Contract*

In *Bragg v. City of Muncie*,¹⁵⁵ the court of appeals held that a city's legitimate business concerns about whether a municipal agreement with a developer satisfied statutory requirements provided the necessary justification to avoid a tortious interference claim.¹⁵⁶ *Bragg* revolved around the Muncie Housing Authority's (MHA's) efforts to demolish and rebuild two housing units.¹⁵⁷ The executive director of MHA entered into an agreement with Bragg to purchase Bragg's real estate and hire Bragg as the developer for the project.¹⁵⁸ The executive director did not tell the mayor about the contract before it was entered,

147. *Id.* at 437 (citing IND. CONST. art. I, § 10).

148. *Id.* at 437-38.

149. *Id.* at 438 (quoting *Cochran v. Indianapolis Newspapers*, 372 N.E.2d 1211, 1217 (Ind. Ct. App. 1978)).

150. *Id.* at 439 (emphasis added) (citing *Journal-Gazette Co. v. Bandido's, Inc.*, 712 N.E.2d 446, 457 (Ind. 1999)).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 440 n.8.

155. 930 N.E.2d 1144 (Ind. Ct. App. 2010).

156. *Id.* at 1148.

157. *Id.* at 1145-46.

158. *Id.* at 1146.

and no records existed indicating that the MHA board ever authorized the executive director to enter the contract.¹⁵⁹ Based on the concerns of the mayor and MHA board members, the MHA board voted to nullify the contract.¹⁶⁰ Bragg sued the MHA and the city, alleging that the city and the mayor tortiously interfered with the contract by inducing the MHA board to repudiate the contract.¹⁶¹ The trial court granted summary judgment for the city.¹⁶²

The court of appeals enumerated the elements of an action for tortious interference with a contract as follows: “(1) the existence of a valid and enforceable contract; (2) the defendant’s knowledge of the existence of the contract; (3) the defendant’s intentional inducement of the breach of contract; (4) *the absence of justification*; and (5) damages from the defendant’s wrongful inducement of the breach.”¹⁶³ Resolution of the case hinged on whether the city had provided adequate justification for inducing MHA’s breach.¹⁶⁴ The court declared that “[i]n short, a legitimate reason for the defendant’s actions provides the necessary justification to avoid liability.”¹⁶⁵ No justification exists, however, if “the interferer acted intentionally, without a legitimate business purpose.”¹⁶⁶

The designated evidence showed that the city and the MHA board were concerned that the executive director had exceeded his authority in entering the contract.¹⁶⁷ Pursuant to Indiana Code section 36-7-18-13, a majority vote of the commissioners of a housing authority is required to authorize the authority’s actions, and it was clear no vote on the contract had been taken.¹⁶⁸ Because the city’s actions were justified, the city was properly granted summary judgment on Bragg’s claim for tortious interference.¹⁶⁹

In *Melton v. Ousley*,¹⁷⁰ the court of appeals held that statements calling a professional golfer a “cheater” were justified and therefore not a basis for a claim of tortious interference.¹⁷¹ Initially, the court considered whether plaintiff Melton asserted a claim for tortious interference with a business relationship or a

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 1146-47.

163. *Id.* at 1147 (emphasis added) (citing *Allison v. Union Hosp., Inc.*, 883 N.E.2d 113, 118 (Ind. Ct. App. 2008)).

164. *See id.* at 1147-48.

165. *Id.* at 1148 (citing *Morgan Asset Holding Corp. v. CoBank ACB*, 736 N.E.2d 1268, 1272 (Ind. Ct. App. 2000)).

166. *Id.* (quoting *Bilimoria Computer Sys., LLC v. Am. Online, Inc.*, 829 N.E.2d 150, 156-57 (Ind. Ct. App. 2005)).

167. *Id.*

168. *Id.*

169. *Id.*

170. 925 N.E.2d 430 (Ind. Ct. App. 2010). For a discussion of the facts of the case, see *supra* notes 140-45 and accompanying text.

171. *Melton*, 925 N.E.2d at 442.

contractual relationship.¹⁷² The elements for both claims are the same, except (1) interference with a business relationship “does not require a showing of the existence of a valid contract,” and (2) interference with a contractual relationship “does not require a showing of illegality.”¹⁷³ The court determined that Melton’s claim was for tortious interference with contract and disregarded arguments relating to the other tort.¹⁷⁴

Applying the elements of the claim, the court evaluated whether defendant Ousley was justified in reporting his concerns about Melton’s PGA classification to the Indiana Section.¹⁷⁵ The court held that the Indiana Section’s procedure for reporting concerns about proper classification provided the required justification.¹⁷⁶ Specifically, the court held that “[w]ith such a procedure in place, Melton cannot reasonably argue that one member of the Section may not allege to the organization such a violation by another member.”¹⁷⁷ It is notable that unlike defamation, the court’s discussion of tortious interference did not evaluate whether the statements to the Indiana Section were true, but only if they were “justified”—that is, made pursuant to a “legitimate business purpose.”¹⁷⁸ The court’s holding should be of interest to other professions that require members to report violations by fellow professionals.¹⁷⁹

VIII. CONTRACT PERFORMANCE AND BREACH

A. Forfeiture

In *Ream v. Yankee Park Homeowner’s Ass’n*,¹⁸⁰ the court of appeals determined that forfeiture of a long-term lease was the appropriate remedy for default where the default was material and the parties agreed to forfeiture in the lease.¹⁸¹ The Reams leased two lots in Yankee Park, a seasonal lakefront trailer park, pursuant to ninety-nine year leases.¹⁸² Because they were lessees, the Reams were also voting members of the nonprofit cooperative that owned Yankee Park.¹⁸³ Upon default, the leases expressly provided for termination of the lease and forfeiture of any membership rights and payments made to Yankee Park.¹⁸⁴

172. *Id.* at 440 n.9.

173. *Id.* (citing *Furno v. Citizens Ins. Co.*, 590 N.E.2d 1137, 1140 (Ind. Ct. App. 1992)).

174. *Id.*

175. *Id.* at 440-42.

176. *Id.* at 441.

177. *Id.*

178. *See id.* at 441-42.

179. *See, e.g.*, IND. PROF’L CONDUCT R. 8.3.

180. 915 N.E.2d 536 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 789 (Ind. 2010).

181. *Id.* at 545.

182. *Id.* at 538.

183. *Id.*

184. *Id.* at 539 (“Upon any such termination of this lease, all membership rights of Lessee in Lessor shall terminate and all payments made by Lessee to Lessor for a Membership Certificate

The Reams moved their trailer several times without providing the notice required in the lease, leading to a dispute with Yankee Park.¹⁸⁵ The Reams initially filed suit against Yankee Park, and Yankee Park counterclaimed, seeking to evict the Reams from their lots.¹⁸⁶ After a bench trial, the trial court ruled for Yankee Park, evicting the Reams and denying all of their requested relief.¹⁸⁷

The Reams argued that there was no basis for involuntary forfeiture because Yankee Park had not shown an “ongoing and material violation” of the lease.¹⁸⁸ The court acknowledged that “forfeitures are rarely, if ever, favored in law”¹⁸⁹ However, where “the contracting parties agreed that a forfeiture should take place upon the failure of one of the parties to the contract to comply with a *material part* thereof, courts will decree a forfeiture.”¹⁹⁰ Because the language of the lease expressly called for forfeiture on default, the court analyzed the sufficiency of the evidence to establish material breach.¹⁹¹

The court concluded without much difficulty that the Reams were in default because they failed to give the required notice before moving their trailer on several occasions and because the trailer was placed in a location that interfered with the access road to the lake and the service road to the other lots in the park.¹⁹² The analysis then turned to whether the Reams’ default was material.¹⁹³

Forfeiture of a lease for breach, as opposed to the award of compensatory damages, is warranted when “the breach is a material one, going to the heart of the contract.”¹⁹⁴ Whether a breach is material is an issue of fact, and the court should consider five factors:

- (A) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (B) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (C) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (D) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and
- (E) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair

shall be retained by Lessor.” (citation omitted)).

185. *Id.* at 539-40.

186. *Id.* at 540.

187. *Id.*

188. *Id.* at 541.

189. *Id.*

190. *Id.* (emphasis added) (citing *Goff v. Graham*, 306 N.E.2d 758, 765 (Ind. App. 1974)).

191. *Id.*

192. *Id.* at 541-42.

193. *Id.* at 542-45.

194. *Id.* at 542-43 (citing *Goff*, 306 N.E.2d at 765).

dealing.¹⁹⁵

The court concluded that the evidence showed that the members of Yankee Park, the other lessees in the park, suffered by having their property encroached upon, their views of the lake disrupted, and access to their lots limited or blocked.¹⁹⁶ These losses, especially access by emergency vehicles on the service road, were unlikely to be adequately compensated monetarily.¹⁹⁷ The court discounted the magnitude of the Reams' loss, because "they specifically agreed to this forfeiture in the event that their leases for Lots 50 and 68 were terminated," equating the provision to a liquidated damages provision.¹⁹⁸ Considering Yankee Park's likely expenses incurred in enforcing the leases and reselling them against the amount paid for the leases, the court determined that forfeiture was not "penal in nature."¹⁹⁹ On the other factors, there was ample evidence of the Reams' bad behavior to show no likelihood that the default would be cured and no good faith effort to comport with the standards of fair dealing.²⁰⁰

Judge Vaidik dissented.²⁰¹ Judge Vaidik thought that the damages caused by the Reams' defaults—"five months of obstructed road access and lake views" and "inconvenience" from not receiving appropriate notice—were capable of measurement and "grossly disproportionate" to "the loss of two prepaid century-long leases."²⁰²

B. Statute of Frauds

In *Grabill Cabinet Co. v. Sullivan*,²⁰³ the court of appeals applied to guaranty contracts the long-established rule that the Statute of Frauds requires only a writing signed by the party to be charged with the contract.²⁰⁴ Sullivan signed a personal guaranty for the debts of her company to Grabill.²⁰⁵ The guaranty was not signed by any person on behalf of Grabill.²⁰⁶ Later, she sold her interest and

195. *Id.* at 543 (quoting *Collins v. McKinney*, 871 N.E.2d 363, 375 (Ind. Ct. App. 2007)).

196. *Id.*

197. *Id.* at 543-44.

198. *Id.* at 544. The court's logic appears somewhat circular on this point. The court was analyzing whether an *agreement* worked a forfeiture and determined that no forfeiture existed because the parties *agreed* to the remedy.

199. *Id.*

200. *Id.* at 544-45 (affirming order of forfeiture). The court also affirmed judgment against the Reams on their claims for equitable relief and damages. *Id.* at 545-47. In particular, the Reams were not entitled to damages for any breach by Yankee Park because they committed the first material breach. *Id.* at 547 (citing *Illiana Surgery & Med. Ctr., LLC v. STG Funding, Inc.*, 824 N.E.2d 388, 403 (Ind. Ct. App. 2005)).

201. *Id.* at 547 (Vaidik, J., dissenting).

202. *Id.* at 548.

203. 919 N.E.2d 1162 (Ind. Ct. App. 2010).

204. *Id.* at 1168.

205. *Id.* at 1164.

206. *Id.*

resigned from her company, but she did not send notice of termination of the personal guaranty to Grabill as allowed for in the guaranty.²⁰⁷ Years later, the company became indebted to Grabill, and Grabill filed suit against Sullivan to collect on her guaranty.²⁰⁸ The trial court granted summary judgment for Sullivan on grounds that the guaranty was defective because Grabill never signed it.²⁰⁹

Without too much difficulty, the court of appeals held that the guaranty was valid and need not have been signed by the obligee.²¹⁰ The Indiana Statute of Frauds states that a person may not bring “[a]n action charging any person, upon any special promise, to answer for the debt, default, or miscarriage of another” unless the contract “on which the action is based, or a memorandum or note describing the . . . contract . . . is in writing and signed by *the party against whom the action is brought*.”²¹¹ The court stated, “Indeed, this seems to be one of those propositions so well-settled in Indiana law that it is difficult to find recent cases restating it.”²¹² Because the action was brought *by* Grabill *against* Sullivan, there was no need for Grabill to sign the guaranty.²¹³

The court of appeals also distinguished and arguably limited the holdings of three prior court of appeals decisions which suggested that guaranty contracts must be “executed” by all parties to the guaranty.²¹⁴ The court first noted that “execution” of a written guaranty is not necessarily the same thing as “signing” the guaranty.²¹⁵ Additionally, the court regarded the cases’ discussion of execution of guaranty contracts as “dicta”; the cited court of appeals cases never addressed the signature requirement for a guaranty.²¹⁶ Lastly, the court felt “absolutely bound” because “[t]he Indiana Supreme Court has never wavered from the statutorily-mandated proposition that a guaranty need only be in writing and signed by the guarantor in order to be valid,” citing cases back to 1876.²¹⁷

In *Hrezo v. City of Lawrenceburg*,²¹⁸ the court of appeals held that two resolutions passed by the city with regards to a land development project were not sufficiently detailed to satisfy the Statute of Frauds, and the Statute of Frauds could not be avoided by operation of promissory estoppel.²¹⁹ Hrezo, a real estate

207. *Id.*

208. *Id.*

209. *Id.* at 1164-65.

210. *See id.* at 1165-67.

211. *Id.* at 1166 (citing IND. CODE § 32-21-1-1(b) (2011)).

212. *Id.*

213. *See id.* at 1166-67.

214. *Id.* at 1167-68 (citing *S-Mart, Inc. v. Sweetwater Coffee Co.*, 744 N.E.2d 580, 585 (Ind. Ct. App. 2001); *Smith v. McLeod Distributing, Inc.*, 744 N.E.2d 459, 465-66 (Ind. Ct. App. 2000); *Kordick v. Merchants Nat’l Bank & Trust Co. of Indianapolis*, 496 N.E.2d 119, 123 (Ind. Ct. App. 1986)).

215. *Id.* at 1167 (citing BLACK’S LAW DICTIONARY 568 (6th ed. 1990)).

216. *Id.*

217. *Id.* at 1168 (citations omitted). The court of appeals reversed. *Id.* at 1168-69.

218. 934 N.E.2d 1221 (Ind. Ct. App. 2010), *trans. denied*.

219. *Id.* at 1229, 1234.

developer, proposed to purchase and redevelop a historic drug store building from the city, using funds loaned from the Lawrenceburg Bond Bank.²²⁰ The city passed a resolution stating, "The City Council is in approval of the basic terms of this project and requests that the matter be turned over to the Lawrenceburg Bond Bank to further develop the specific requirements of the plan."²²¹ The city passed a second, substantially identical resolution adding a second building to the proposal.²²² Hrezo and the city worked to negotiate a development agreement over the next two years, but due to disagreement largely over which party would bear costs of repairs to the building's roof, no development agreement was signed, and the city withdrew the proposal.²²³ Hrezo sued under breach of contract and promissory estoppel theories.²²⁴ The trial court granted summary judgment for the city on the breach of contract claim but denied summary judgment on the promissory estoppel claim.²²⁵ With regard to the breach of contract claim, Hrezo argued that the resolutions passed by the city were sufficient to satisfy the Statute of Frauds.²²⁶

The Indiana Statute of Frauds states that a person may not bring "[a]n action involving any contract for the sale of land" unless the contract "on which the action is based, or a memorandum or note describing the . . . contract . . . is in writing and signed by the party against whom the action is brought."²²⁷ To satisfy the statute, a writing evidencing a contract for the sale of land

must be evidenced by some writing:

- (1) which has been signed by the party against whom the contract is to be enforced or his authorized agent;
- (2) which describes with reasonable certainty each party and the land; and
- (3) which states with reasonable certainty the terms and conditions of the promises and by whom and to whom the promises were made.²²⁸

The court of appeals concluded that the resolutions passed by the city represented "preliminary negotiations and . . . [did] not signify a final, written contract."²²⁹ The court largely relied on the Indiana Supreme Court case *Coca-Cola Co. v. Babyback's International, Inc.*, where the writing at issue specifically referenced several "preliminary details remaining to be resolved."²³⁰ Even though

220. *Id.* at 1223-24.

221. *Id.* at 1224.

222. *Id.*

223. *Id.* at 1224-26.

224. *Id.* at 1226.

225. *Id.*

226. *Id.* at 1227.

227. *Id.* (quoting IND. CODE § 32-21-1-1(b) (2011)).

228. *Id.* (citing *Johnson v. Sprague*, 614 N.E.2d 585, 588 (Ind. Ct. App. 1993)).

229. *Id.* at 1229.

230. *Id.* at 1228 (quoting *Coca-Cola Co. v. Babyback's Int'l, Inc.*, 841 N.E.2d 557, 563 (Ind.

numerous details had been agreed to, the “overall tenor” of the writing in *Babyback’s* established that no final agreement had been reached.²³¹ Like in *Babyback’s*, the resolutions at issue in *Hrezo* established preliminary negotiations; the resolutions specifically stated that “the specific requirements of the plan” had to be worked out in further negotiations with the Lawrenceburg Bond Bank, and the parties worked for two years in an attempt to reach final agreement.²³²

After finding that the Statute of Frauds had not been satisfied, the court considered whether the city could be bound by an oral promise under a theory of promissory estoppel.²³³ Of course, allowing a claim to proceed on an oral promise where the Statute of Frauds is not satisfied threatens to render the statute “virtually meaningless because the frustrated claimant would always assert an oral promise/agreement to defeat by means of estoppel the statute’s requirement for a written one.”²³⁴ Therefore a “high bar” must be satisfied to establish promissory estoppel.²³⁵ The claimant must show five elements: “1) a promise by the promisor; 2) made with the expectation that the promisee will rely thereon; 3) which induces reasonable reliance by the promisee; 4) of a definite and substantial nature; and 5) injustice can be avoided only by enforcement of the promise.”²³⁶ A claimant “is entitled to reliance damages only,” and to establish injustice required by the fifth element, the reliance injury must be “1) independent from the benefit of the bargain and the resulting expenses and inconvenience; and 2) so substantial as to constitute an unjust and unconscionable injury.”²³⁷

Applying the rule, the court of appeals determined that *Hrezo’s* claimed reliance damages were neither independent from the benefit of the bargain nor sufficiently substantial.²³⁸ *Hrezo* claimed it incurred expenses creating a new legal entity to enter the contract, devoting time to negotiations, applying for a liquor license, and hiring various professionals.²³⁹ All of these expenses were not independent because they were “actions it would have had to take in order to finalize the contract on any basis.”²⁴⁰ Essentially, the court held that expenses incurred in negotiating the contract and preparing for performance were not

2006)).

231. *Id.* (quoting *Babyback’s*, 841 N.E.2d at 563).

232. *Id.* at 1229 (emphasis omitted) (citation omitted).

233. *Id.* at 1230-34.

234. *Id.* at 1231 (quoting *Babyback’s*, 841 N.E.2d at 568-69).

235. *Id.* (quoting *Spring Hill Developers, Inc. v. Arthur*, 879 N.E.2d 1095, 1101 (Ind. Ct. App. 2008)).

236. *Id.* (quoting *Spring Hill*, 879 N.E.2d at 1100). Indiana’s rule is “more restrictive” than RESTATEMENT OF CONTRACTS § 139. *Id.* (citing *Babyback’s*, 841 N.E.2d at 569).

237. *Id.* at 1231-32 (quoting *Spring Hill*, 879 N.E.2d at 1103).

238. *Id.* at 1232-33.

239. *Id.* at 1233.

240. *Id.*

recoverable under promissory estoppel.²⁴¹

Additionally, there was no substantial or definite promise by the city to support a claim of promissory estoppel; as discussed above, the city's resolutions were preliminary in nature, and the parties engaged in negotiations for two years that eventually broke down.²⁴² The court of appeals reversed the trial court's denial of summary judgment for the city on the promissory estoppel claim.²⁴³

C. Money Had and Received

In *Farmers Elevator Co. of Oakville v. Hamilton*,²⁴⁴ the court of appeals held that a farmer's claims for money had and received and breach of fiduciary duty against an agricultural cooperative were barred by the applicable statutes of limitation and that the "hedge-to-arrive" contracts were enforceable forward contracts.²⁴⁵ Hamilton, a farmer, and FECO, a grain elevator, entered "four hedge-to-arrive [HTA] contracts for the sale of grain."²⁴⁶ The contracts specified that Hamilton was to deliver certain types and amounts of grain to FECO for stated prices in the future.²⁴⁷ The contracts did not specify a delivery date, but they did include language allowing the farmer to "roll" the contract to a later month in the same year for a fee (the amount of which was also not specified in the contract).²⁴⁸ Hamilton never delivered the grain, instead extending the contract several times and incurring rolling charges for doing so.²⁴⁹ The contracts were eventually terminated.²⁵⁰ After termination, Hamilton signed a series of promissory notes agreeing to pay FECO the amount due and made several payments on the notes.²⁵¹ Before his entire indebtedness had been paid, Hamilton sued FECO, seeking, inter alia, recovery of amounts paid on the promissory notes under a theory of money had and received, damages for breach of fiduciary duty, and a declaration that the HTA contracts were unenforceable futures contracts.²⁵² FECO appealed after the jury trial verdict for Hamilton.²⁵³

The court of appeals held that the trial court should have granted judgment on the evidence to FECO on Hamilton's claim for money had and received.²⁵⁴ In reaching this conclusion, the court stated that "[a]n action for money had and

241. *See id.*

242. *Id.* at 1233-34.

243. *Id.* at 1234.

244. 926 N.E.2d 68 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 823 (Ind. 2010).

245. *Id.* at 79-80, 83.

246. *Id.* at 72.

247. *Id.*

248. *Id.*

249. *Id.* at 73.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 73-75.

254. *Id.* at 77-79.

received ‘is an equitable remedy’” available when the defendant has received money that belongs to the plaintiff “‘under such circumstances that in equity and good conscience he ought not to retain the same.’”²⁵⁵ The court applied the three-year statute of limitations contained in Indiana Code section 26-1-3.1-118(g), which is the negotiable instruments chapter of Indiana’s UCC.²⁵⁶ The court did not state why the UCC statute of limitations applied; presumably, the promissory notes at issue were negotiable instruments subject to the UCC.²⁵⁷ The discovery rule is not applicable to section 3.1-118, meaning that a claim for money had and received “accrues at the time the payments are made irrespective of his knowledge or discovery of injury.”²⁵⁸ Notably, section 3.1-118(g) appears to be limited to claims arising under the UCC, but the court’s holding speaks generally of “recoupment of money had and received based on payments made to the defendant” without any limitation to UCC claims.²⁵⁹ Applying the statute, the court of appeals held that claims based on Hamilton’s first three payments were time-barred, and the “continuing wrong” doctrine was not applicable.²⁶⁰ The court also held that all of Hamilton’s claims for breach of fiduciary duty were barred by the two-year statute of limitations, and no evidence supported tolling the statute based on fraudulent concealment.²⁶¹

After deciding the statutes of limitation issues, the court moved on to determine whether the HTA contracts were unenforceable “futures contracts” or enforceable “forward contracts.”²⁶² Specifically, “[t]he reason the futures/forward distinction is of consequence is that futures contracts are governed and regulated by federal law, but forward contracts are not.”²⁶³ A “futures contract” must be traded on a designated or registered exchange, or under federal law it is

255. *Id.* at 77 (quoting *Lawson v. First Union Mortg. Co.*, 786 N.E.2d 279, 283-84 (Ind. Ct. App. 2003)).

256. *Id.* (“[A]n action . . . for conversion of an instrument, for money had and received, or like action based on conversion . . . must be commenced within three (3) years after the cause of action accrues.” (quoting IND. CODE § 26-1-3.1-118(g) (2011))); *see also* U.C.C. § 3-118(g) (1990) (same).

257. *See Farmers Elevator Co.*, 926 N.E.2d at 77.

258. *Id.* at 78 (citing *Auto-Owners Ins. Co. v. Bank One*, 852 N.E.2d 604, 611-12 (Ind. Ct. App. 2006), *vacated on other grounds*, 879 N.E.2d 1086 (Ind. 2008) (UCC conversion); *Tanglewood Terrace, Ltd. v. City of Texarkana*, 996 S.W.2d 330, 337 (Tex. Ct. App. 1999) (money had and received); *Angelini v. Delaney*, 966 P.2d 223, 229 (Or. Ct. App. 1998) (money had and received)).

259. *Id.* The UCC official comment makes it clear that “[s]ubsection (g) covers warranty and conversion cases and other actions to enforce obligations or rights *arising under Article 3.*” U.C.C. § 3-118 cmt. 6 (1990) (emphasis added).

260. *Id.* at 78-79.

261. *Id.* at 79-80 (citing IND. CODE § 34-11-2-4; *City of East Chicago v. E. Chi. Second Century, Inc.*, 908 N.E.2d 611, 618 (Ind. 2009)).

262. *Id.* at 80-83.

263. *Id.* at 82.

“unlawful.”²⁶⁴ The court discussed “[t]he refined, prevailing test” from jurisdictions across the country, which considers whether (1) the contract contains unique terms making it not fungible with other commodities contracts; (2) the contract is between industry participants; and (3) delivery cannot be deferred forever.²⁶⁵ “Under any approach or formulation, the touchstone of the future/forward determination is whether the contract contemplates actual, physical delivery of the subject commodity.”²⁶⁶

Applying the factors from *Nagel*, the court held that the HTA contracts were enforceable forward contracts.²⁶⁷ The contracts contained “specific terms for delivery” and were therefore not fungible; the contracts were between a farmer and grain elevator, “industry participants”; and because Hamilton was actually charged a “rolling fee” for every extension of time, the contracts could not be deferred indefinitely.²⁶⁸

D. Indemnity

In *Indianapolis City Market Corp. v. MAV, Inc.*,²⁶⁹ the court of appeals held that the City Market had breached its contract with a vendor, was not entitled to indemnification, and was liable for the vendor’s lost profits.²⁷⁰ MAV ran a Greek restaurant stand inside the historic City Market in downtown Indianapolis.²⁷¹ Pursuant to terms in MAV’s lease, the City Market relocated MAV to the east wing of the City Market while the historic Market House portion of the City Market was undergoing renovations.²⁷² On August 24, 2007, City Market sent a letter-agreement to MAV confirming City Market’s obligation under the lease to pay for MAV’s buildout in the renovated Market House.²⁷³ City Market made an initial payment of \$5000 to MAV’s selected contractor; however, MAV later chose to find another contractor.²⁷⁴ MAV had its attorney hold the \$5000 in trust until it selected another contractor.²⁷⁵ City Market demanded that the \$5000 be returned immediately, and when MAV refused, City Market “terminated” the

264. *Id.* (citing 7 U.S.C. § 6(a) (2006)).

265. *Id.* (citing *Nagel v. ADM Investor Servs., Inc.*, 217 F.3d 436, 441 (7th Cir. 2000) (collecting cases)).

266. *Id.* (citing 7 RICHARD A. LORD, WILLISTON ON CONTRACTS §§ 17:10, 17:11 (4th ed. 1997)).

267. *Id.* at 83.

268. *Id.* The court found that delivery could not be deferred indefinitely in spite of some ambiguity in regards to delivery date and rolling fees. *Id.* The court reversed and remanded. *Id.*

269. 915 N.E.2d 1013 (Ind. Ct. App. 2009).

270. *Id.* at 1023-24, 1026.

271. *Id.* at 1016.

272. *Id.*

273. *Id.* at 1017.

274. *Id.*

275. *Id.*

August 24 letter-agreement on October 24, 2007.²⁷⁶ Prior to termination, City Market had actually approved MAV's new contractor.²⁷⁷ MAV sued City Market, seeking a declaration that City Market breached the lease and damages.²⁷⁸ The trial court entered a declaratory judgment for MAV on February 19, 2008, and shortly thereafter, the parties agreed to complete the buildout in the Market House.²⁷⁹ "MAV opened for business in the renovated Market House" on April 7, 2008.²⁸⁰ After a bench trial in 2009, the trial court awarded MAV damages for lost profits for the period of November 2007 to April 2008.²⁸¹

Initially, the court of appeals affirmed the trial court's judgment that City Market had breached the letter-agreement.²⁸² City Market contended that MAV had misrepresented that it had already selected a contractor at the time of the letter-agreement.²⁸³ The court found no requirement in the "four corners" of the agreement for MAV to have already selected a contractor; further, because City Market was the drafter, "if the selection of a certain contractor and a signed contract were vital conditions of the letter-agreement, the terms of that documents should have reflected the same."²⁸⁴

The court of appeals soundly rejected City Market's contention that an indemnification clause in the lease exculpated City Market from liability for its own breach of lease.²⁸⁵ "In general, an indemnity clause 'covers the risk of harm sustained by *third persons* that might be caused by either the indemnitor or the indemnitee. It shifts the financial burden for the ultimate payment of damages from the indemnitee to the indemnitor.'"²⁸⁶ Furthermore, "[i]ndemnification clauses are not void as against public policy, though they will be strictly construed, and the intent to indemnify the indemnitee for its own negligence must be stated in clear and unequivocal terms."²⁸⁷ The lease at issue included broad indemnification language:

Tenant shall indemnify and save harmless Landlord, and Landlord shall indemnify and save harmless Tenant, from and against any and all liability, liens, claims, demands, damages, expenses, fees, costs, fines, penalties, suits, proceedings, actions, and causes of action of any and

276. *Id.* at 1018.

277. *Id.*

278. *Id.*

279. *Id.* at 1018-19.

280. *Id.* at 1019.

281. *Id.* at 1019-21.

282. *Id.* at 1022-23.

283. *Id.* at 1023.

284. *Id.*

285. *Id.* at 1023-24.

286. *Id.* at 1023 (quoting *Morris v. McDonald's Corp.*, 650 N.E.2d 1219, 1222 (Ind. Ct. App. 1995)).

287. *Id.* at 1023-24 (citing *Sequa Coatings Corp. v. N. Ind. Commuter Transp. Dist.*, 796 N.E.2d 1216, 1222 (Ind. Ct. App. 2003)).

every kind and nature arising or growing out of or in any way connected with Tenant's use, occupancy, management, or control of the Premises or Tenants' operations, conduct or activities in the building.²⁸⁸

City Market contended that this language protected City Market from damages for its own breach of lease; the court rejected this argument as "specious."²⁸⁹ The lease did not state that City Market would be indemnified for its own negligence or breach.²⁹⁰ The indemnification clause was apparently "designed to cover the risk of harm sustained by third persons" and was therefore inapplicable to the first-party claim between City Market and MAV.²⁹¹ Additionally, City Market's construction was simply untenable—*any* breach of lease would be covered, eliminating even the City Market's ability to recover damages for nonpayment of rent.²⁹²

Lastly, the court affirmed the award of MAV's lost profits, which it held were properly foreseeable consequential damages.²⁹³ The court cited *Johnson v. Scandia Associates*, where the Indiana Supreme Court reaffirmed the rule from *Hadley v. Baxendale*, that breach of contract damages are allowed "when the non-breaching party's loss flows naturally and probably from the breach and was contemplated by the parties when the contract was made."²⁹⁴ "Consequential damages may include lost profits, providing the evidence is sufficient to allow the trier of fact to estimate the amount with a reasonable degree of certainty and exactness."²⁹⁵ The court held that the award of lost profits MAV suffered from the delay in opening in the renovated Market House was within the scope of the evidence and affirmed.²⁹⁶

E. Economic Loss Doctrine

In *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.*,²⁹⁷ the Indiana Supreme Court dismissed negligence claims against engineers involved in a large construction project because the claims sought damages for "economic loss," which belongs in the domain of contract law.²⁹⁸ The case arose out of the problem- and delay-plagued renovation and expansion project of the

288. *Id.* at 1024 (citation omitted).

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 1024 n.5.

293. *Id.* at 1024-26.

294. *Id.* at 1024 (citing *Johnson v. Scandia Assocs.*, 717 N.E.2d 24, 31 (Ind. 1999)); *see also* *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145 (Exch.).

295. *Id.* (citing *Clark's Pork Farms v. Sand Livestock Sys., Inc.*, 563 N.E.2d 1292, 1298 (Ind. Ct. App. 1990)).

296. *Id.* at 1026.

297. 929 N.E.2d 722 (Ind. 2010).

298. *Id.* at 732.

library's main downtown Indianapolis facility.²⁹⁹ Specifically, several construction and design defects arose with the underground parking garage, which threatened the entire project because the parking garage was to act as the foundation for the rest of the building.³⁰⁰ The library incurred significant costs curing the defects and through associated delays.³⁰¹ The library sued the architect, engineers, and general contractor in negligence and, where a contractual relationship existed, breach of contract.³⁰² The library settled with the architect and general contractor—the only parties in a direct contractual relationship with the library—leaving the library's negligence claims against the engineers.³⁰³ The trial court granted the engineers partial summary judgment on the grounds that the negligence claims were barred by the “economic loss rule.”³⁰⁴

The supreme court succinctly stated Indiana law on the economic loss doctrine, citing *Gunkel v. Renovations, Inc.*, an important Indiana Supreme Court case on economic loss.³⁰⁵ Under a negligence theory, “where the injury to the plaintiff is from a defective product or service (as the Library alleges here), the defendant is liable under a tort theory if the defect causes personal injury or damage to property *other than the product or service itself*.”³⁰⁶ “However, Indiana cases go on to hold that the defendant is not liable under a tort theory for any purely economic loss caused by its negligence (including, in the case of a defective product or service, *damage to the product or service itself*).”³⁰⁷

The supreme court embarked on a lengthy examination of the history and theoretical justifications for the economic loss rule.³⁰⁸ In the opinion, the supreme court cited extensively to a draft Restatement of Economic Torts.³⁰⁹ The court tracked the Indiana precedent on the economic loss doctrine, starting in the 1980s up to *Gunkel*, the most recent supreme court case on the subject.³¹⁰ The court cited two justifications for the economic loss rule: contract law, not tort, is properly suited to resolving liability for economic losses,³¹¹ and the economic loss

299. *See id.* at 725.

300. *Id.*

301. *Id.* at 725-26. The court of appeals opinion contains a more detailed discussion of the facts surrounding the library construction project. *See Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C.*, 900 N.E.2d 801, 804-08 (Ind. Ct. App. 2009), *vacated*, 929 N.E.2d 722 (Ind. 2010).

302. *Indianapolis-Marion Cnty. Pub. Library*, 926 N.E.2d at 726.

303. *Id.*

304. *Id.*

305. *Id.* at 726-27 (citing *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 153 (Ind. 2005)).

306. *Id.* at 726 (emphasis added) (citation omitted).

307. *Id.* at 726-27 (emphasis added) (citation omitted).

308. *Id.* at 727-30.

309. *Id.* at 727-28 (citing RESTATEMENT (THIRD) OF ECONOMIC TORTS & RELATED WRONGS (Council Draft No. 2, 2007)).

310. *Id.*

311. *Id.* at 729-30 (citing *Miller v. U.S. Steel Corp.*, 902 F.2d 573, 574 (7th Cir. 1990); *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965)).

rule prevents unbounded liability, especially in negligent misstatement cases.³¹² The first justification was clearly applicable to this case, where “the [l]ibrary looked to a series of contracts to establish the relative expectations of the parties.”³¹³

The court noted that the economic loss doctrine was subject to two limitations: “there (1) must be purely economic loss for it to apply and (2) are some exceptions to its application even where there is purely economic loss.”³¹⁴ The library argued that both of these limitations allowed its claims to go on.

The court held that the library sought damages for purely economic loss.³¹⁵ “[P]ure economic loss’ means pecuniary harm not resulting from an injury to the plaintiff’s person or property.”³¹⁶ This covers “‘damage to the product or service itself’” and damages “‘from the failure of the product or service to perform as expected.’”³¹⁷ However, as a “corollary,” damages are recoverable in tort “‘if the defect causes personal injury or damage to *other* property.’”³¹⁸ The court determined that “the Library purchased a complete refurbishing of its library facility” as an integrated whole; therefore, any damages caused by the engineers’ negligence was to the product itself and not to “other property.”³¹⁹ It did not matter that the damages were “physical” requiring reconstruction and repair; the damages were economic losses because they were based on the value of the product and services purchased by the library.³²⁰ Likewise, the “imminent risk of danger” and personal harm associated with the structural defects did not avoid the economic loss rule, even though the absence of personal injury in this case may have been somewhat fortuitous.³²¹

Next, the court concluded that no policy-based exception to the economic loss rule was applicable.³²² First, the library argued that the economic loss rule should not apply to “engineers and design professionals.”³²³ The court recognized that certain “appropriate exceptions” to the general economic loss rule exist—for example, claims for legal malpractice, breach of fiduciary duty, breach of duty to

312. *Id.* at 730 (citing *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931). Note that in spite of the *Ultramares* justification, a significant exception to the economic loss doctrine applies to negligent misstatement cases.

313. *Id.* at 730.

314. *Id.*

315. *Id.* at 731-34.

316. *Id.* at 731.

317. *Id.* at 731 (quoting *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 153 (Ind. 2005)).

318. *Id.* (quoting *Gunkel*, 822 N.E.2d at 153).

319. *Id.* at 731-32 (citing RESTATEMENT (THIRD) OF ECONOMIC TORTS & RELATED WRONGS § 8 cmt. c(2) (Council Draft No. 2, 2007)).

320. *See id.* at 732 & n.9 (citing cases from other jurisdictions).

321. *Id.* at 733 (citing *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 490-91 (Ind. 2001)). It follows that in the event the library building collapsed, tort damages would be proper only if someone was hurt or another building was damaged. *See id.*

322. *See id.* at 734-42.

323. *Id.* at 734.

settle by an insurer, and negligent misstatement.³²⁴ However, the court did not provide any guidance on *why* such exceptions exist.³²⁵ The court refused to create an exception for design professionals, finding that the policy justifications for the economic loss rule “amply justif[ied] application of these precedents to engineers and design professionals.”³²⁶ Essentially, there was no good reason to distinguish between contractors and professionals for damages from the same construction defects.³²⁷

The court further held that the economic loss rule was particularly appropriate in a large construction project where the participants have the opportunity to allocate risks through a “network or chain of contracts.”³²⁸ Construction projects involve an intricate network of participants, all with roles varying from project to project.³²⁹ The participants should be encouraged to allocate risks using the tools available, such as indemnification, performance bonds, or insurance.³³⁰ “The concepts of shifting and sharing the risk of loss are equally applicable to the construction industry where the provision of professional design services is implicated.”³³¹ Even though participants may not have direct contractual relationships with every entity involved in the project, parties can allocate risks when they “enter[] into a contract with a party involved in the *network of contracts*.”³³²

The library also argued that the economic loss rule did not prevent claims against design professionals based on negligent misrepresentation.³³³ The court recognized that an exception to the economic loss rule existed for certain negligent misrepresentations outside privity of contract, but the exception was inapplicable where “the [l]ibrary is connected with the [d]efendants through a network or chain of contracts.”³³⁴

Last, the court rejected the library’s argument that the economic loss doctrine did not apply where the defendant supplied solely services and not a tangible

324. *Id.* at 736.

325. *See id.*

326. *Id.* at 735.

327. *See id.* at 735 (citing *Flagstaff Affordable Hous. Ltd. P’ship v. Design Alliance, Inc.*, 223 P.3d 664, 673 (Ariz. 2010); *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 206 P.3d 81, 89 (Nev. 2009)).

328. *Id.* at 736-40.

329. *See id.* at 737-38.

330. *See id.* at 738.

331. *Id.*

332. *Id.* at 740 (emphasis added) (quoting *BRW, Inc. v. Dufficy & Sons, Inc.* 99 P.3d 66, 72 (Colo. 2004)); *see also* *Rissler & McMurry Co. v. Sheridan Area Water Supply Joint Powers Bd.*, 929 P.2d 1228, 1235 (Wyo. 1996); *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 992-93 (Wash. 1994); *RESTATEMENT (THIRD) OF ECONOMIC TORTS & RELATED WRONGS* § 8(3)(c)(i) (Council Draft No. 2, 2007).

333. *Indianapolis-Marion Cnty. Pub. Library*, 926 N.E.2d at 740-41.

334. *Id.* at 741. *See* the discussion of *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742 (Ind. 2010), *infra* nn.337-49.

product.³³⁵ The court left open the possibility that an exception might exist “in appropriate circumstances,” but it held that in general, the economic loss rule applies to both products and services.³³⁶

In *U.S. Bank, N.A. v. Integrity Land Title Corp.*,³³⁷ decided the same day as *Indianapolis-Marion County Public Library*, the Indiana Supreme Court allowed a tort claim for negligent misrepresentation to go forward pursuant to an exception to the economic loss rule.³³⁸ The facts were relatively simple. As part of a real estate transaction where U.S. Bank was the lender, Integrity performed a title search and issued a title commitment that failed to disclose a foreclosure judgment on the property.³³⁹ U.S. Bank sued for breach of contract and “negligent real estate closing.”³⁴⁰ The trial court granted summary judgment to Integrity on both claims.³⁴¹

The supreme court made clear that Integrity had argued at all times that it was not in contractual privity with U.S. Bank.³⁴² The court noted, “This is a critical point. Were there to be a contract between Integrity and U.S. Bank, the parties in all likelihood would be relegated to their contractual remedies.”³⁴³ Without any contract, economic loss may be recovered in tort under certain exceptions, including claims for “negligent misstatement.”³⁴⁴

The case then resolved on an issue of first impression whether Indiana would recognize a tort action for negligent misrepresentation against a title insurer or commitment issuer.³⁴⁵ The court noted that other states have split on this issue.³⁴⁶ Indiana courts had previously adopted the tort of negligent misrepresentation in other contexts, specifically referencing section 552(1) of the Restatement

335. *Indianapolis-Marion Cnty. Pub. Library*, 926 N.E.2d at 741-42.

336. *Id.* at 742. In doing so, the court rejected the reasoning behind *Insurance Co. of North America v. Cease Electric Inc.*, 688 N.W.2d 462, 464 (Wis. 2004). The supreme court affirmed summary judgment for the engineers. *Indianapolis-Marion Cnty. Pub. Library*, 926 N.E.2d at 742.

337. 929 N.E.2d 742 (Ind. 2010).

338. *Id.* at 749.

339. *Id.* at 744. Technically, the lender in the real estate transaction was Texcorp, which subsequently assigned the note, mortgage, and mortgage insurance policy to U.S. Bank. *Id.* at 744 & n.1.

340. *Id.* at 744.

341. *Id.* at 744-45.

342. *Id.* at 745. Note that the stated lack of privity appears to conflict with the supreme court’s statement that “Texcorp [U.S. Bank’s predecessor in interest] contracted with [Integrity] . . . to prepare a title commitment . . .” *Id.* at 744 (emphasis added).

343. *Id.* at 745 (citing *Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 729 (Ind. 2010)). Because there was no contractual privity, the court summarily affirmed the court of appeals’s opinion on the issue. *Id.*

344. *Id.* at 745-46 (quoting *Indianapolis-Marion Cnty. Pub. Library*, 929 N.E.2d at 736) (citing RESTATEMENT (THIRD) OF ECONOMIC TORTS & RELATED WRONGS § 12 (Council Draft No. 2, 2007)).

345. *Id.* at 746.

346. *Id.* at 746-47.

(Second) of Torts.³⁴⁷ The court additionally cited several “factors” regarding duty in tort for negligent misrepresentation suggested by the unaccepted draft Restatement of Economic Torts.³⁴⁸ Applying all of these considerations, the court determined that a tort duty existed—title companies know mortgage lenders rely on preliminary title commitments, and in this case the title company acted in an advisory role, with superior knowledge, for a fee.³⁴⁹

In *KB Home Indiana Inc. v. Rockville TBD Corp.*,³⁵⁰ the court of appeals held that the economic loss rule did not bar a negligence action for damages to real property resulting from discharge of pollution.³⁵¹ For years, the manufacturing facility operated by Rockville leached toxic solvents, including trichloroethylene (TCE), into the surrounding environment.³⁵² The neighboring landowners, the Kopetskys, subdivided their land and sold the lots to KB for the purpose of developing a residential subdivision.³⁵³ KB eventually discovered groundwater contamination in the purchased lots and halted construction on the subdivision.³⁵⁴ Among other parties, KB sued Rockville in negligence, trespass, and continuing nuisance.³⁵⁵ The trial court granted summary judgment for Rockville, finding that KB’s claims were barred by the economic loss doctrine.³⁵⁶

Under the economic loss doctrine, “contract is the sole remedy for the failure of a product or service to perform as expected.”³⁵⁷ Further, “if the plaintiff is not seeking damages involving the benefit of the bargain or other matters governed by contract and/or related principles, the economic loss doctrine does not bar a negligence action.”³⁵⁸

The court of appeals reversed the trial court, finding that the economic loss doctrine did not bar a negligence action.³⁵⁹ KB had no contract with Rockville, a polluter located on adjoining property.³⁶⁰ KB may have had contract claims for breach of warranty against the vendor, Kopetsky, but this “[did] not absolve Rockville of responsibility for *its* negligent conduct that may have caused the

347. *Id.* at 747 (citing *Greg Allen Constr. Co. v. Estelle*, 798 N.E.2d 171, 174 (Ind. 2003)).

348. *Id.* at 748-49 (quoting RESTATEMENT (THIRD) OF ECONOMIC TORTS & RELATED WRONGS § 9 cmt. f (Council Draft No. 2, 2007)).

349. *Id.* at 749-50 (accepting the reasoning of *Bank of Cal., N.A. v. First Am. Title Ins. Co.*, 826 P.2d 1126, 1129 (Alaska 1992)). The supreme court reversed the trial court’s grant of summary judgment to Integrity on the tort claim. *Id.* at 750.

350. 928 N.E.2d 297 (Ind. Ct. App. 2010).

351. *Id.* at 299.

352. *Id.* at 300.

353. *Id.* at 300-01.

354. *Id.* at 301.

355. *Id.* at 301-02.

356. *Id.* at 303.

357. *Id.* at 304 (citing *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 152 (Ind. 2005)).

358. *Id.* at 305 (citing *Choung v. Iemma*, 708 N.E.2d 7, 13 (Ind. Ct. App. 1999)).

359. *Id.*

360. *Id.*

contamination.”³⁶¹

It is noteworthy that the opinion in *KB Home* was issued without the benefit of the Indiana Supreme Court’s opinion in *Indianapolis-Marion County Public Library*.³⁶² The opinion in *KB Home* appears to be consistent with the supreme court’s holding in that case because a land purchaser will ordinarily be in a position to allocate risk with the vendor, but not any adjoining property owners.³⁶³

361. *Id.*

362. *Id.* at 304-05 n.3 (noting that the supreme court had granted transfer but no decision had been issued).

363. *See id.* In resolving KB’s other claims, the court of appeals determined that an action for nuisance was inappropriate because the contamination had ceased long ago (there was no nuisance to abate). *Id.* at 307-08. The court determined that an action for trespass was inappropriate because the act of trespass, the contamination, had ceased before plaintiff KB came to possess the land. *Id.* at 308. The court distinguished *Cooper Industries, LLC v. City of South Bend*, 899 N.E.2d 1274, 1284 (Ind. 2009), as deciding when an environmental legal action accrued, and not “whether South Bend had a legally sufficient trespass claim.” *Id.* The court similarly distinguished *Pflanz v. Foster*, 888 N.E.2d 756 (Ind. 2008), as involving a claim under the Underground Storage Tank Act and not in trespass. *Id.* KB’s claims for environmental damage were allowed, but only under a negligence theory. *Id.* at 309.

RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

DANIEL K. BURKE*

During the survey period,¹ the Indiana Supreme Court and the Indiana Court of Appeals rendered several decisions addressing principles of state procedural law and providing helpful interpretations of the Indiana Rules of Trial Procedure.

I. INDIANA SUPREME COURT DECISIONS

A. *Subject Matter Jurisdiction*

In *West v. Wadlington*,² the supreme court held that a court is not divested of subject matter jurisdiction over defamation and invasion of privacy claims simply because the defendant pleads a religious defense in reliance on the First Amendment Free Exercise Clause.³

Wadlington and West were both members of the Mt. Olive Missionary Baptist Church.⁴ In October 2007, Wadlington sent an e-mail to members of the church's board of deacons and board of trustees, contending that West should be "dealt with" by being removed from certain influential church committees.⁵ In a memo attached to her e-mail, Wadlington also alleged that West was a "one woman wrecking crew" and "anything but Christ-like."⁶ Wadlington's memo also accused West of playing an inappropriate role in events leading to the dismissal of the church's former pastor and "possessing an 'evil spirit.'"⁷ In February 2008, West filed a complaint alleging defamation and invasion of privacy.⁸

West responded with a motion to dismiss pursuant to Trial Rule 12(B)(1), arguing that "under the First and Fourteenth Amendments to the United States Constitution any adjudication of West's complaint would require excessive entanglement in the [c]hurch's politics and doctrine."⁹ The trial court granted the motion and dismissed West's complaint with prejudice.¹⁰ The court of appeals

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1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—i.e., from October 1, 2009, through September 30, 2010—as well as amendments to the Indiana Rules of Trial Procedure, which were ordered by the Indiana Supreme Court during the survey period.

2. 933 N.E.2d 1274 (Ind. 2010).

3. *Id.* at 1275.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 1275-76.

8. *Id.* at 1276.

9. *Id.*

10. *Id.*

reversed the trial court.¹¹

The Indiana Supreme Court granted transfer and affirmed the court of appeals, concluding that the mere assertion of a religious-based affirmative defense does not oust the court's subject matter jurisdiction.¹² In reaching this result, the court considered a line of cases standing for the proposition that a court retains subject matter jurisdiction over employment disputes, notwithstanding a religious defense.¹³

B. Statute of Limitations

In *Eads v. Community Hospital*,¹⁴ the Indiana Supreme Court examined whether the Indiana Journey's Account Statute (JAS) would permit a medical malpractice plaintiff to avoid an otherwise time-barred complaint.¹⁵

On August 15, 2004, Eads's leg was placed in a cast; however, she was denied a wheelchair and had to exit Community Hospital on crutches.¹⁶ Eads fell attempting to leave the hospital, and on August 8, 2006, she filed a premises liability complaint.¹⁷ The hospital argued that Eads's complaint sounded in medical malpractice, but she had not filed her proposed complaint with the Indiana Department of Insurance (IDOI) as required by the state medical malpractice act (MMA).¹⁸ Accordingly, the hospital moved to dismiss Eads's complaint for lack of jurisdiction.¹⁹ On April 12, 2007, the trial court dismissed Eads's premises liability complaint.²⁰

Approximately two weeks before the trial court was able to rule on the hospital's motion (but more than two years after her accident), Eads filed a proposed medical malpractice complaint with the IDOI, alleging the same facts as her premises liability complaint.²¹ The hospital responded to this complaint with a summary judgment motion, arguing that Eads's complaint was barred by the MMA's two-year statute of limitations.²² The trial court granted the hospital's motion, and Eads appealed, relying on the JAS²³ to support her argument that the IDOI complaint was a continuation of her original premises liability complaint.²⁴

11. *Id.*

12. *Id.* at 1277.

13. *See id.* at 1276-77.

14. 932 N.E.2d 1239 (Ind. 2010).

15. *Id.* at 1242.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. IND. CODE § 34-11-8-1(b) (2011).

24. *Eads*, 932 N.E.2d at 1242.

The court of appeals rejected this argument and affirmed the trial court.²⁵

The supreme court granted transfer to consider whether the JAS would operate to enable Eads to avoid limitations.²⁶ As the court noted, the JAS applies when a plaintiff fails in the prosecution of an action for any reason other than “negligence in the prosecution.”²⁷ Further, if the JAS applies, the plaintiff may bring a new action by the later of three years after the JAS was found to apply or the last date the action could have been brought under the statute of limitations applicable to the original action.²⁸ The court rejected the hospital’s argument that Eads was negligent in the prosecution of the action for failing to appeal the trial court’s dismissal of the premises liability complaint or mistakenly filing her malpractice claim as a premises liability claim.²⁹ The court next rejected the hospital’s claim that the medical malpractice claim could not be a continuation of the premises liability complaint, concluding that Eads was not required to make such a showing and that the allegations contained in the premises liability complaint were sufficient to place the hospital on notice as to the nature of Eads’s allegations.³⁰

C. Continuance

In *Gunashekar v. Grose*,³¹ the court reaffirmed the notion that a pro se litigant is to be held to same procedural rules as litigants represented by trained counsel.³²

Grose filed suit against the Gunashekars, alleging that they failed and refused to pay for repair work completed at property the Gunashekars leased and forged her signature on a check made payable to Grose by the Gunashekars’ insurance company.³³ Initially, the Gunashekars were represented by counsel, who filed an answer and counterclaim in response to Grose’s complaint.³⁴ During a March 12, 2007 pretrial conference, the trial court advised the parties that there would be no continuances of the July 31 through August 1, 2007 bench trial.³⁵

Approximately eight weeks before trial, the Gunashekars’ attorney moved for leave to withdraw as their counsel.³⁶ The trial court granted this motion on June 14, 2007—six weeks before trial—and reiterated that there would be no continuances of the trial.³⁷ Nevertheless, on July 20, 2007—eleven days before

25. *Id.*

26. *Id.* at 1243.

27. *Id.* (quoting IND. CODE § 34-11-8-1(a)).

28. *Id.*; see IND. CODE § 34-11-8-1(b).

29. *Eads*, 932 N.E.2d at 1244.

30. See *id.* at 1245-46.

31. 915 N.E.2d 953 (Ind. 2009).

32. *Id.* at 955.

33. *Id.* at 954.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

trial—the Gunashekars, who were then proceeding pro se, requested a continuance to enable them an opportunity to retain counsel.³⁸ The trial court denied the motion and conducted the bench trial from July 31 to August 1, 2007.³⁹ After reviewing the parties' proposed findings of fact and conclusions of law, the trial court entered judgment in Grose's favor, awarding her \$147,337.04 in damages plus \$296,520 as treble damages and attorneys' fees.⁴⁰

Following the court of appeals's reversal based on the denial of the continuance, the Indiana Supreme Court granted transfer and reversed the appellate court, concluding that a pro se litigant is bound to follow the same procedural rules applicable to represented parties.⁴¹ In reaching this result, the court noted that Trial Rule 53.5 requires that the trial court grant a continuance upon "a showing of good cause established by affidavit or other evidence."⁴² However, because the Gunashekars offered no evidence to indicate whether they had diligently sought new counsel, the court held that the trial court did not abuse its discretion in denying the motion for continuance.⁴³

D. Disqualification to Act

In *State ex rel. Crain Heating Air Conditioning & Refrigeration, Inc. v. Clark Circuit Court*,⁴⁴ the court resolved an apparent conflict between Trial Rule 65(A)(3), which requires a ruling on a motion for preliminary injunction within ten days after the hearing, and Trial Rule 53.1, which is referenced in Rule 65(A)(3) but requires that a trial court must rule on a motion within thirty days of the hearing.⁴⁵

In August 2009, Crain filed a complaint for damages and injunctive relief against one of its competitors and several of its former employees who had gone to work for the competitor.⁴⁶ The trial court conducted a preliminary injunction hearing on August 20, 2009 and requested that the parties submit proposed findings of fact and conclusions of law by September 14, 2009—twenty-five days after the hearing.⁴⁷ On September 11, 2009, the trial court granted one of the defendants' request for an additional ten days to submit proposed findings and conclusions.⁴⁸ On September 17, 2009, Crain moved the trial court to reconsider the extension, arguing that it would "take the matter past the 30 days allowed in

38. *Id.*

39. *Id.*

40. *Id.* at 955.

41. *Id.*

42. *Id.* (quoting IND. TRIAL R. 53.5).

43. *Id.* at 955-56.

44. 921 N.E.2d 1281 (Ind. 2010) (per curiam).

45. *Id.* at 1284.

46. *Id.* at 1282.

47. *Id.* at 1282-83.

48. *Id.* at 1283.

... [Trial Rule] 53.1.”⁴⁹ On September 21, 2009, Crain filed a praecipe pursuant to Trial Rules 53.1 and 65(A)(3), requesting that the clerk determine that more than thirty days had passed since the preliminary injunction hearing.⁵⁰ The trial court denied Crain’s motion to reconsider on September 22, 2009, and on September 29, 2009, the clerk determined that there had been no delay in the preliminary injunction ruling.⁵¹

On October 2, 2009, the trial court entered an order denying the motion for preliminary injunction and stating that the defendants were entitled to a hearing regarding their request to recover attorneys’ fees incurred defending against Crain’s preliminary injunction motion.⁵² In response, Crain filed an original action in the Indiana Supreme Court, requesting a writ that would require (1) the clerk to withdraw the case from the trial court and transmit it to the Indiana Supreme Court for assignment of a special judge; and (2) the trial court to vacate its October 2, 2009 order.⁵³ The court granted the requested writ on December 9, 2009.⁵⁴

The court began its analysis with the observation that if a trial court fails to rule on a motion within thirty days after it was heard, Trial Rule 53.1 provides for the removal of the cause from the trial court.⁵⁵ However, Trial Rule 65(A)(3) requires that the trial court rule within ten days of a hearing on a motion for preliminary injunction.⁵⁶ The court resolved this apparent inconsistency by holding that

unless an order is entered within ten days after the hearing upon the granting, modifying, or dissolving of a temporary restraining order or preliminary injunction, there has been a delay in ruling and an interested party may immediately praecipe for withdrawal under the procedure provided in Trial Rule 53.1(E). . . . [I]t is not necessary for a party to await the thirty-day period described in Trial Rule 53.1(A) before filing a praecipe for withdrawal.⁵⁷

E. Summary Judgment

1. *Reiswerg v. Statom*.—In *Reiswerg v. Statom*,⁵⁸ in a matter of first impression in Indiana, the supreme court held that a party responding to a motion for partial summary judgment on an issue or an element, but not as to liability, is

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* (citing IND. TRIAL R. 53.1(A)).

56. *Id.* at 1284.

57. *Id.* at 1284-85 (internal citation omitted).

58. 926 N.E.2d 26 (Ind. 2010).

under no obligation to present all of its affirmative defenses at the summary judgment stage.⁵⁹

Statom filed a legal malpractice action against Reiswerg and another law firm arising from their failure to file a timely medical malpractice complaint against the Indiana Department of Veterans Affairs.⁶⁰ In response, both defendants asserted the affirmative defense that Statom had not filed her legal malpractice claim against them within the applicable statute of limitations.⁶¹ In November 2006—approximately a year into the lawsuit—Statom moved for partial summary judgment, seeking a ruling that the defendants were “negligent as a matter of law.”⁶² Neither defendant raised the statute of limitations issue in opposition to Statom’s summary judgment motion.⁶³ The trial court granted Statom’s motion as to Reiswerg but denied it as to the other law firm.⁶⁴

In July 2007, both defendants moved for summary judgment on statute of limitations grounds.⁶⁵ Statom responded by moving to strike both motions, arguing that the defendants had waived their statute of limitations defense by failing to assert it in response to Statom’s summary judgment motion.⁶⁶ The trial court granted Statom’s motion to strike.⁶⁷ The court of appeals affirmed as to Reiswerg but reversed as to the other defendant.⁶⁸

The Indiana Supreme Court granted transfer and concluded that because Statom’s motion for partial summary judgment was directed to the breach and factual causation elements of her legal malpractice claims, and because the motion did not address all issues bearing on liability, the defendants were not obligated to raise the statute of limitations defense in response to Statom’s motion.⁶⁹ The court began with the notion that a “party responding to a motion for summary judgment is entitled to take the motion as the moving party frames it.”⁷⁰ Consequently, a “non-movant is not required to address a particular element of a claim unless the moving party has first addressed and presented evidence on that element.”⁷¹ Because Statom’s motion did not discuss the defendants’ statute of limitations defense and did not seek to impose liability, the defendants were not obligated to raise their statute of limitations affirmative defense.⁷² Moreover,

59. *Id.* at 32.

60. *Id.* at 28.

61. *Id.*

62. *Id.* (citation omitted).

63. *Id.* at 28-29.

64. *Id.* at 29.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 30-31.

70. *Id.* at 30.

71. *Id.* (citing *Jarboe v. Landmark Cmty. Newspapers, Inc.*, 644 N.E.2d 118, 123 (Ind. 1994)).

72. *Id.* at 31.

if Statom had desired to address the statute of limitations defense, she could have either confronted it directly in her summary judgment motion or broadened the scope of her motion to seek to impose liability on the defendants.⁷³

2. *Kroger Co. v. Plonski*.—In *Kroger Co. v. Plonski*,⁷⁴ the court clarified that conflicting summary judgment evidence is not grounds to strike evidence submitted by a party.

Plonski was assaulted and robbed in a Kroger parking lot on October 2, 2003.⁷⁵ On September 30, 2005, she filed a complaint for damages against Kroger.⁷⁶ On March 26, 2007, Kroger moved for summary judgment, arguing that: (1) it owed Plonski no duty; (2) to the extent it owed her a duty, it did not breach it; and (3) Plonski's injuries were not proximately caused by Kroger's conduct.⁷⁷ In support of its summary judgment motion, Kroger submitted three affidavits, including affidavits by its risk manager and safety manager, who asserted that the Kroger location in question was in a low-crime area and that there had been only one crime reported within two years of Plonski's assault.⁷⁸ Following an extension, Plonski responded in opposition to the motion on May 25, 2007.⁷⁹

In September 2007, Kroger produced sixty pages of police reports that reflected over thirty police responses to criminal activity occurring at the Kroger in question during the two years preceding Plonski's assault.⁸⁰ During the May 8, 2008 summary judgment hearing, the trial court declined to consider these reports as supplements to Plonski's summary judgment response; however (at the trial court's encouragement), Plonski made an oral motion to strike the affidavits submitted by Kroger and offered the police reports in support of her motion.⁸¹ At the conclusion of the hearing, the trial court struck the affidavits and denied the summary judgment motion.⁸² The court of appeals affirmed, holding that "Kroger's duty was established by evidence that Plonski was assaulted in the grocery store parking lot."⁸³

The Indiana Supreme Court granted transfer and also affirmed the trial court's judgment, but for different reasons.⁸⁴ The court first noted that trial courts have broad discretion regarding the admissibility of evidence and that this "discretion extends to rulings on motions to strike affidavits on the grounds that

73. *Id.*

74. 930 N.E.2d 1 (Ind. 2010).

75. *Id.* at 3.

76. *Id.*

77. *Id.* at 3-4.

78. *Id.* at 4.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

they fail to comply with the summary judgment rules.”⁸⁵ However, Plonski did not argue—much less establish—that Kroger’s affidavits failed to comply with summary judgment rules.⁸⁶ The court continued, “Affidavits submitted in support of or in opposition to a motion for summary judgment may be stricken for a variety of reasons. But a difference of opinion about what the facts are alleged to be is not one of them.”⁸⁷

The court concluded that where there is a competing claim regarding the facts, the remedy is not to strike a party’s submissions; rather, when submissions demonstrate that material facts are in dispute, the solution is to deny the summary judgment motion.⁸⁸

F. Preliminary Injunction

In *Leone v. Bureau of Motor Vehicles*,⁸⁹ the court held that although an Indiana resident is free to use any name he or she chooses, a government agency need not use a changed name without a court order certifying the name change.⁹⁰

In 2005, the Indiana Bureau of Motor Vehicles (BMV) started the practice of verifying information through commercial databases.⁹¹ In accordance with this approach, the BMV compared its records with those of the Social Security Administration (SSA) from May to October 2007.⁹² After reviewing the results, the BMV sent letters to 199,562 individuals advising them that their names on file with the BMV did not match SSA records and that failure to update the information could result in the invalidation of their driver’s licenses or identification cards.⁹³ In December 2007, the BMV mailed a second set of letters to 117,370 people who still had discrepancies between their BMV and SSA records.⁹⁴ This time, the BMV advised that if the information was not updated, the recipients’ driver’s licenses or identification cards “must be invalidated.”⁹⁵ On February 28, 2008, the BMV sent a “final notice” stating that the recipients’ driving privileges would “be revoked” until the BMV received updated information.⁹⁶

Following the second letter, Leone filed suit seeking certification of a class under Trial Rule 23(A) and (B)(2), a declaratory judgment that the BMV’s policy

85. *Id.* at 5 (quoting *Price v. Freeland*, 832 N.E.2d 1036, 1039 (Ind. Ct. App. 2005)).

86. *Id.*

87. *Id.* (citing *Hayes v. Trs. of Ind. Univ.*, 902 N.E.2d 303, 311 (Ind. Ct. App. 2009), *trans. denied*).

88. *Id.* at 5-6.

89. 933 N.E.2d 1244 (Ind. 2010).

90. *Id.* at 1254.

91. *Id.* at 1246.

92. *Id.*

93. *Id.*

94. *Id.* at 1247.

95. *Id.* (citation omitted).

96. *Id.*

was illegal, and a preliminary injunction preventing the BMV from enforcing its policy.⁹⁷ The trial court certified the class as those who were threatened with invalidation of their driver's licenses or identification cards based on discrepancies between BMV and SSA records.⁹⁸ However, the trial court denied the class's motion for a preliminary injunction.⁹⁹ On interlocutory appeal, the court of appeals concluded that the BMV's policy was lawful and that it had a rational basis, but it also determined that its procedures for resolving discrepancies violated the class members' due process rights.¹⁰⁰

The court granted transfer and affirmed the trial court's denial of the class's motion for a preliminary injunction.¹⁰¹ The court began its discussion with a recitation of the required elements a movant must establish in order to obtain a preliminary injunction and noted that "[f]ailure to prove any one of these elements requires denying the injunction."¹⁰²

The class members sought to establish that they were likely to succeed on the merits of their claim (one of the requisite elements to obtain a preliminary injunction), arguing that the common law permits name changes by common usage and that with no clear definition of "full legal name," the BMV was required to use their commonly used names.¹⁰³ The court agreed with the class that "a person may lawfully change his or her name without resort to any legal proceedings where it does not interfere with the rights of others and is not done for a fraudulent purpose."¹⁰⁴ However, as the court concluded,

While the courts have a unique power to certify a name change, Hoosiers still may refer to themselves by any name they like. They may not, however, demand that government agencies begin using their new names without a court order. This dual structure recognizes the reality that names serve multiple purposes, both private and public.¹⁰⁵

II. INDIANA COURT OF APPEALS DECISIONS

A. Service of Process

In *Marshall v. Erie Insurance Exchange*,¹⁰⁶ the court held that service of

97. *Id.*

98. *Id.* at 1248.

99. *Id.*

100. *Id.* at 1248-57.

101. *Id.* at 1248.

102. *Id.* (citing *Apple Glen Crossing, LLC v. Trademark Retail, Inc.*, 784 N.E.2d 484 (Ind. 2003)).

103. *Id.* at 1250.

104. *Id.* at 1252.

105. *Id.* at 1254 (internal citations omitted).

106. 923 N.E.2d 18 (Ind. Ct. App.), *aff'd on reh'g*, 930 N.E.2d 628 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 830 (Ind. 2010).

process by mail is sufficient if delivery is acknowledged, even if the intended recipient does not personally acknowledge receipt.¹⁰⁷

The Marshalls owned a vacant lot adjacent to Cain's property.¹⁰⁸ On December 31, 2006, a tree on the Marshalls' property fell onto Cain's house, causing significant damage.¹⁰⁹ Cain filed a claim with Erie, her insurance carrier, which reimbursed Cain for the cost of repairs and brought an action, as subrogee of Cain, against Marshall to recover the amount it had paid to Cain.¹¹⁰ Erie served Mrs. Marshall with a summons and copy of its complaint via first class mail addressed to the post office box reflected in the tax records for the Marshalls' vacant lot.¹¹¹ Mr. Marshall appeared by counsel and answered Erie's complaint.¹¹² Following a two-day bench trial, the trial court entered judgment in favor of Erie.¹¹³ Marshall appealed and argued, *inter alia*, that the trial court erred "by failing to address the issue of insufficient service of process."¹¹⁴

The court of appeals first explained that Trial Rule 4.1 permits service by "sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgment of receipt may be requested and obtained."¹¹⁵ The court rejected Mr. Marshall's argument that Mrs. Marshall never personally received the summons and complaint, explaining that "service by mail is effective even if someone other than the intended recipient ultimately signs the return receipt."¹¹⁶ Further, the Marshalls' attorney entered an appearance and answered Erie's complaint on Mrs. Marshall's behalf without ever challenging the sufficiency of service through a motion to dismiss or argument to the trial court.¹¹⁷

B. Statute of Limitations

In *Rieth-Riley Construction Co. v. Gibson*,¹¹⁸ the court reversed the trial court's denial of summary judgment, declining to extend the discovery rule to toll limitations where the unknown information is the identity of a defendant, not the existence of an injury.¹¹⁹ As an additional basis for its decision, the court also

107. *Id.* at 26.

108. *Id.* at 21.

109. *Id.*

110. *Id.*

111. *Id.* at 21-22.

112. *Id.* at 22.

113. *Id.*

114. *Id.*

115. *Id.* (quoting IND. TRIAL R. 4.1).

116. *Id.* (citing *Precision Erecting, Inc. v. Wokurka*, 638 N.E.2d 472, 474 (Ind. Ct. App. 1994)).

117. *Id.* at 23.

118. 923 N.E.2d 472 (Ind. Ct. App. 2010).

119. *See id.* at 476-77.

clarified the operation of the relation back doctrine of Trial Rule 15(C).¹²⁰

Gibson was involved in an auto accident with Schroeder on September 27, 2006.¹²¹ Gibson filed a complaint against Schroeder on July 15, 2008.¹²² Through discovery, Gibson learned that at the time of the accident, Schroeder was employed by Rieth-Riley.¹²³ Accordingly, on March 18, 2009, Gibson sought leave to amend his complaint by adding Rieth-Riley as a defendant.¹²⁴ Rieth-Riley filed a motion to dismiss, arguing that Gibson's claim against it was time-barred because it was filed more than two years after the accident.¹²⁵ The trial court treated Rieth-Riley's motion to dismiss as a summary judgment motion and denied it.¹²⁶ Rieth-Riley brought an interlocutory appeal.¹²⁷

The court first observed that under Indiana's "discovery rule," a cause of action accrues and the applicable statute of limitations begins to run when the plaintiff knows—or, in the exercise of ordinary diligence, should have known—that he has sustained an injury.¹²⁸ The rationale behind this rule, the court reasoned, is that "it is inconsistent with our system of jurisprudence to require a claimant to bring his cause of action in a limited period in which, even with due diligence, he could not be aware of a cause of action."¹²⁹ On appeal, Gibson argued that his cause of action against Rieth-Riley did not accrue on the date of the accident (September 27, 2006), but when he learned through discovery that Rieth-Riley was a potential defendant by virtue of its employment of Schroeder at the time of the accident.¹³⁰ However, the court rejected this argument, noting that Gibson was aware of his injury on September 27, 2006 and declining "to extend the discovery rule to apply to cases like this one where the indeterminate fact is not the existence of any injury, but rather the identity of a tortfeasor."¹³¹

Next, the court rejected the notion that Gibson's claim against Rieth-Riley would "relate back" to the date of the original (and timely) filing against Schroeder pursuant to Trial Rule 15(C).¹³² Rule 15(C) provides:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date

120. *Id.* at 477-79.

121. *Id.* at 474.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 475 (citing *Pflanz v. Foster*, 888 N.E.2d 756, 759 (Ind. 2008)).

129. *Id.* at 476 (quoting *Barnes v. A.H. Robbins Co.*, 476 N.E.2d 84, 86 (Ind. 1985)).

130. *Id.* at 475.

131. *Id.* at 476-77.

132. *Id.* at 477-79.

of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within one hundred and twenty (120) days of commencement of the action, the party to be brought in by amendment:

- (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and
- (2) knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against him.¹³³

As the party seeking relation back, Gibson bore the burden of establishing that the conditions of Trial Rule 15(C) had been satisfied.¹³⁴ However, while there was no dispute that the claim against Rieth-Riley arose out of the same accident as Gibson's claim against Schroeder, the court concluded that Gibson had failed to meet the remaining requirements of Trial Rule 15(C).¹³⁵ Specifically, Gibson presented no evidence to establish that Rieth-Riley had actual or constructive notice of the accident, the lawsuit, or its potential involvement within 120 days of the accident.¹³⁶ Further, Gibson failed to present anything to contradict Rieth-Riley's evidence that it had no knowledge of the accident until March 30, 2009.¹³⁷

C. Pleadings

In *Hilliard v. Jacobs*,¹³⁸ the court affirmed the trial court's denial of a belated attempt to amend a complaint to add claims that had been available when the original complaint was filed.¹³⁹ The court also rejected the use of a reply counterclaim as a means of avoiding the trial court's refusal to permit the new claims.¹⁴⁰

In litigation that had been pending for over three years, Hilliard sought leave to amend her complaint to add several claims following an adverse summary judgment ruling.¹⁴¹ The court affirmed the trial court's denial of leave, concluding that the proposed claims were available to Hilliard when the original complaint was filed.¹⁴² Specifically, the court determined that there was no

133. IND. TRIAL R. 15(C).

134. *Rieth-Riley*, 923 N.E.2d at 478 (citing *Crossroads Servs. Ctr., Inc. v. Coley*, 842 N.E.2d 822, 824-25 (Ind. Ct. App. 2005)).

135. *Id.* at 478-79.

136. *Id.* at 478.

137. *Id.* at 478-79.

138. 927 N.E.2d 393 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 826 (Ind. 2010).

139. *Id.* at 401.

140. *Id.* at 403.

141. *Id.* at 397.

142. *Id.* at 398-99.

justification for not asserting all claims in the original complaint and that waiting for three years—and the failure of other claims—constituted undue delay and was prejudicial to Jacobs.¹⁴³

Next, the court rejected Hilliard's attempt to bring the same claims as a reply counterclaim.¹⁴⁴ Jacobs had asserted a counterclaim against Hilliard seeking to recover attorneys' fees arising from Hilliard's breach of contract.¹⁴⁵ Hilliard sought to seize this as an opportunity to assert the claims she had been unable to bring in an amended complaint.¹⁴⁶ However, the court affirmed the trial court's rejection of this approach, concluding that the proposed reply counterclaims, which had (at best) a tangential relationship to the contract at issue in Jacobs's counterclaim, were permissive, not compulsory.¹⁴⁷ Accordingly, the court concluded that the reply counterclaim was properly stricken.¹⁴⁸

D. Class Action

In *Perdue v. Murphy*,¹⁴⁹ the court affirmed the trial court's denial of class certification based on the lack of required definiteness of the proposed class.¹⁵⁰

The plaintiffs filed suit, invoking the Americans with Disabilities Act of 1990 (ADA) and the Recovery Act of 1973 and seeking declaratory and injunctive relief, as well as certification of certain classes.¹⁵¹ Included among the proposed classes was "Class B," which included disabled individuals (and their families) who, by reason of their disabilities, required certain accommodations in connection with applying for and receiving various welfare benefits but were denied benefits for failing to cooperate in the administrative process.¹⁵² The trial court denied certification of Class B.¹⁵³

On appeal, the court first noted that a proposed class must meet all the requirements of Trial Rule 23(A)—i.e., numerosity, commonality, typicality, and adequate representation—and at least one of the requirements of Rule 23(B).¹⁵⁴ Further, the court observed that there is an implicit "definiteness" requirement.¹⁵⁵ Specifically, the court stated:

Because a judgment in a class action has res judicata effect on absent class members, a properly defined class is necessary at the outset. A

143. *See id.*

144. *Id.* at 401-02.

145. *Id.* at 401.

146. *Id.*

147. *Id.* at 402.

148. *Id.* at 403.

149. 915 N.E.2d 498 (Ind. Ct. App. 2009), *reh'g denied*.

150. *Id.* at 511.

151. *Id.* at 503.

152. *Id.*

153. *Id.*

154. *Id.* at 504.

155. *Id.* at 505.

class definition must be specific enough for the court to determine whether or not an individual is a class member. Without a properly defined class, a class action cannot be maintained.¹⁵⁶

However, relying largely on *Hohider v. United Parcel Service, Inc.*,¹⁵⁷ the court concluded that certification under Trial Rule 23(B)(2) or (B)(3) would require that the plaintiffs comprising the class be “qualified” to bring actions under the ADA; however, this would require inquiries that were too individualized and divergent to warrant class certification.¹⁵⁸

E. Involuntary Dismissal

1. *Conder v. RDI/Caesars Riverboat Casino, Inc.*—In *Conder v. RDI/Caesars Riverboat Casino, Inc.*,¹⁵⁹ the court considered whether an employee who was allegedly injured in the course of her employment aboard a riverboat casino had standing to bring a claim as a “maritime worker.”¹⁶⁰

Conder worked aboard a riverboat casino as a card dealer.¹⁶¹ During her employment, she sustained several flea bites, which required that she take large doses of steroids.¹⁶² Conder contended that the steroids caused her to have a heart attack.¹⁶³ In 2005, Conder filed a complaint against Caesars, asserting claims under the Jones Act and under Indiana’s worker’s compensation laws as a “Sieracki seaman.”¹⁶⁴ The trial court dismissed Conder’s claims, and she appealed.¹⁶⁵

On appeal, the court concluded that because the riverboat casino was permanently moored to the dock and functioned as a gaming establishment, not a seafaring vessel, Conder lacked standing under the Jones Act.¹⁶⁶ Similarly, the court rejected Conder’s attempt to bring claims as a Sieracki seaman, which arises from the United States Supreme Court’s decision in *Seas Shipping Co. v. Sieracki*.¹⁶⁷ In *Sieracki*, the Supreme Court held that a longshoreman injured as a result of a dangerous, defective condition while aboard a vessel could recover against the vessel’s owner under the theory that the owner had breached the warranty of seaworthiness of the ship.¹⁶⁸ The court concluded that Conder could

156. *Id.* at 505 (internal citations omitted).

157. 574 F.3d 169, 200 (3d Cir. 2009).

158. *See Perdue*, 915 N.E.2d at 508.

159. 918 N.E.2d 759 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 791 (Ind. 2010).

160. *Id.* at 762.

161. *Id.* at 761.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 762.

166. *Id.* at 763.

167. 328 U.S. 85 (1946), *superseded by statute as stated in* *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619 (1996).

168. *Id.* at 99-102.

not bring a claim as a Sieracki seaman because her work as a card dealer did not constitute maritime employment, i.e., she was not involved in the essential elements of loading and unloading a vessel.¹⁶⁹ Further, as with Conder's Jones Act claim, she lacked standing as a Sieracki seaman because the riverboat casino aboard which she was allegedly injured was not a vessel in navigation.¹⁷⁰

2. *Brightpoint, Inc. v. Pedersen*.—In *Brightpoint, Inc. v. Pedersen*,¹⁷¹ the court affirmed the trial court's dismissal of an action based on comity grounds.¹⁷²

On March 23, 2009, Pedersen, the former European president of Brightpoint Europe A/S (BPE), initiated arbitration in Denmark, alleging that BPE had failed to make certain payments pursuant to a contract executed among the parties in connection with Pedersen's resignation from BPE.¹⁷³ On April 28, 2009, BPE and Brightpoint filed a complaint against Pedersen in Marion Superior Court, alleging that Pedersen had breached the parties' contract.¹⁷⁴ Without serving Pedersen with a copy of the Indiana complaint or otherwise notifying him that the action had been filed, BPE responded to Pedersen's arbitration complaint by arguing that the proper forum for the dispute would be a court of competent jurisdiction, as there was no binding arbitration agreement among the parties.¹⁷⁵ In response to this argument, Pedersen withdrew his arbitration complaint and initiated litigation in a Danish court.¹⁷⁶ After being served with the summons and complaint in the Indiana action, Pedersen moved to dismiss on comity grounds.¹⁷⁷ The trial court granted Pedersen's motion, and BPE and Brightpoint appealed.¹⁷⁸

On appeal, the court began with a discussion of general comity principles, i.e., that "Indiana courts may respect final decisions of sister courts as well as proceedings pending in those courts."¹⁷⁹ Further, the court identified two factors to consider in determining whether to stay or dismiss an action on comity grounds: (1) whether the first suit is proceeding normally and without delay; and (2) whether there is a risk the parties may be subject to multiple or inconsistent judgments.¹⁸⁰ The court also considered cases interpreting Trial Rule 12(B)(8), "which expressly permits dismissal of a lawsuit where another action is pending in another *Indiana* state court."¹⁸¹ Accordingly, the court also evaluated whether the two lawsuits involved the same parties and issues, whether the parties were

169. *Conder*, 918 N.E.2d at 763.

170. *Id.*

171. 930 N.E.2d 34 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 829 (Ind. 2010).

172. *Id.* at 41.

173. *Id.* at 37.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 38.

178. *Id.*

179. *Id.* at 39 (citing *George S. May Int'l Co. v. King*, 629 N.E.2d 257, 260 (Ind. Ct. App. 1994)).

180. *Id.* at 40.

181. *Id.*

seeking the same remedies, and which litigation was initiated first.¹⁸² The court concluded that the same parties (Pedersen and BPE) were involved in both matters, that the parties were litigating substantially the same issues (rights and obligations under the parties' contract), and that the Danish litigation had been initiated first.¹⁸³ Therefore, the court affirmed the trial court's dismissal on comity grounds.¹⁸⁴

F. Discovery

1. *White-Rodgers v. Kindle*.—In *White-Rodgers v. Kindle*,¹⁸⁵ the court reversed the trial court's order compelling discovery related to experts retained in a prior lawsuit.¹⁸⁶

Kindle brought a products liability action against White-Rodgers alleging certain defects in a water heater manufactured by White-Rodgers.¹⁸⁷ During pretrial discovery, Kindle moved to compel White-Rodgers to produce all expert-related material from a prior lawsuit in Missouri.¹⁸⁸ The trial court initially ordered White-Rodgers to produce all documents relating to experts from the Missouri action.¹⁸⁹ However, in response to White-Rodgers's motion to reconsider, the trial court amended its order, requiring White-Rodgers to produce documents relating to testifying experts but specifically exempting materials relating to consulting experts.¹⁹⁰ In light of this limitation, White-Rodgers took the position that it had nothing more to produce, explaining that it had designated no testifying experts in the Missouri action.¹⁹¹ In response, Kindle moved for sanctions, arguing that White-Rodgers was playing semantics games and continuing to evade its discovery obligations.¹⁹² The trial court granted the sanctions motion, finding that White-Rodgers had failed to establish that any of the experts retained in the Missouri action were intended to be solely consulting experts.¹⁹³

On appeal, the court began with the requirement that "[i]n the case of an expert 'who is not expected to be called as a witness at trial,' a 'showing of exceptional circumstances' is required in order to go forward with discovery."¹⁹⁴ This, the court reasoned, is "to prevent a party from building his own case by

182. *Id.*

183. *Id.* at 40-41.

184. *Id.* at 41.

185. 925 N.E.2d 406 (Ind. Ct. App. 2010).

186. *Id.* at 415.

187. *Id.* at 408.

188. *Id.*

189. *Id.* at 409.

190. *Id.*

191. *Id.*

192. *Id.* at 409-10.

193. *Id.* at 410.

194. *Id.* at 413 (quoting IND. TRIAL R. 26(B)(4)(b)).

means of his opponent's financial resources, superior diligence and more aggressive preparation."¹⁹⁵ Thus, "under Indiana law, a party's designation of a testifying expert is a crucial decision that directly affects the discovery protection provided by Rule 26(B)(4)(b)."¹⁹⁶ Because White-Rodgers had not designated any testifying experts in the Missouri litigation, Kindle had to demonstrate "exceptional circumstances under which it . . . [was] impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."¹⁹⁷ Kindle failed in this respect; accordingly, the court concluded that White-Rodgers had complied with its discovery obligations and reversed the trial court's sanctions order.¹⁹⁸

2. *Dean v. Weaver*.—In *Dean v. Weaver*,¹⁹⁹ the court affirmed the trial court's determination that it lacked jurisdiction to re-open a matter to resolve a dispute regarding expert witness fees where the trial court had opened the matter pursuant to Trial Rule 28.²⁰⁰

In March 2007, Kristine Weaver initiated a divorce action against Loren Weaver in St. Joseph County, Michigan.²⁰¹ During the proceedings, Loren indicated that Ronald Dean, who resided in Elkhart County, Indiana, might be used as an expert witness.²⁰² Accordingly, in July 2007, Loren filed a proceeding in Elkhart Superior Court seeking the trial court's assistance in conducting discovery in Indiana pursuant to Trial Rule 28(E).²⁰³ Loren and Kristine thereby deposed Dean over several days.²⁰⁴

In January 2009, Loren and Kristine settled their dispute, and on February 6, 2009, the Michigan court entered a final order disposing of the matter.²⁰⁵ On March 16, 2009, Dean invoiced Kristine for his time and attorneys' fees.²⁰⁶ When Kristine refused to pay, Dean petitioned the Elkhart trial court to re-open the matter for the sole purpose of his fee claim.²⁰⁷ The trial court re-opened the matter, but on December 9, 2009, it concluded that it lacked jurisdiction to consider Dean's request for fees and dismissed the action.²⁰⁸

On appeal, the court observed that Trial Rule 28(E) enables "Indiana courts to assist tribunals and litigants outside this state by providing a mechanism to

195. *Id.* (quoting *R.R. Donnelley & Sons Co. v. N. Tex. Steel Co.*, 752 N.E.2d 112, 132 (Ind. Ct. App. 2001)).

196. *Id.*

197. *Id.* (quoting IND. TRIAL R. 26(B)(4)(b)).

198. *Id.* at 414-15.

199. 928 N.E.2d 254 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 826 (Ind. 2010).

200. *Id.* at 258.

201. *Id.* at 255.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 256.

pursue discovery within Indiana's jurisdiction in a cause initiated outside Indiana's jurisdiction."²⁰⁹ However, the court concluded that an Indiana court's jurisdiction under Trial Rule 28(E) is ancillary to the principal proceeding.²¹⁰ Accordingly, when the principal proceeding terminates, so does an Indiana court's ability to act pursuant to Rule 28(E).²¹¹ Because the Michigan court had closed the principal divorce action between Loren and Kristine, the Elkhart trial court lacked jurisdiction to consider Dean's fee request.²¹²

3. *Huber v. Montgomery County Sheriff*.—In *Huber v. Montgomery County Sheriff*,²¹³ the court determined that the trial court erred in failing to hold a hearing before imposing sanctions under Rule 37.²¹⁴

Huber filed a tort action against the Montgomery County sheriff.²¹⁵ In response to what the sheriff believed to be incomplete, evasive discovery responses by Huber, the sheriff moved to compel and for sanctions.²¹⁶ Without first conducting a hearing, the trial court granted the motion to compel and imposed sanctions on Huber.²¹⁷

On appeal, the court agreed with Huber that the trial court erred in imposing Rule 37 sanctions without first conducting a hearing.²¹⁸ The court noted that the purpose of Rule 37 sanctions is to "provide[] the trial court with tools to enforce compliance" with discovery obligations.²¹⁹ Further, the court observed that an "award of sanctions is mandatory subject only to a showing that the losing party's conduct was substantially justified, or that other circumstances make an award of sanctions unjust."²²⁰ However, before the court may award sanctions under Rule 37, it must first conduct a hearing to determine both whether sanctions are appropriate and the appropriate amount of sanctions.²²¹ Accordingly, the court reversed and remanded with instructions that the trial court conduct a hearing to determine whether Huber's resistance to the sheriff's discovery was substantially justified.²²²

209. *Id.* at 257.

210. *Id.*

211. *Id.* at 257-58.

212. *Id.* at 258.

213. 940 N.E.2d 1182 (Ind. Ct. App. 2010).

214. *Id.* at 1187.

215. *Id.* at 1183.

216. *Id.*

217. *Id.* at 1183-84.

218. *Id.* at 1185.

219. *Id.* at 1186 (citing *M.S. ex rel. Newman v. K.R.*, 871 N.E.2d 303, 311 (Ind. Ct. App. 2007)).

220. *Id.* (citing *Penn Cent. Corp. v. Buchanan*, 712 N.E.2d 508, 513 (Ind. Ct. App. 1999)).

221. *Id.*

222. *Id.* at 1187.

G. Summary Judgment

In *State ex rel. Berkshire v. City of Logansport*,²²³ the court relied on the Indiana Supreme Court's recent decision in *Reiswerg v. Statom*²²⁴ in concluding that a summary judgment respondent did not waive its statute of limitations affirmative defense by failing to assert it in response to a summary judgment motion.²²⁵

In April 2009, Berkshire filed an action challenging Logansport's violation of conditions set forth in a will and deed transferring property on which Logansport operated a public park.²²⁶ In June 2010, Berkshire moved for partial summary judgment as to his standing to assert his claims.²²⁷ Logansport's response included seventy pages from the files of the individual who had donated the land; however, Logansport did not specifically identify any portion of these documents in support of its summary judgment position.²²⁸ The trial court granted Berkshire's motion regarding his standing.²²⁹ Shortly thereafter, Logansport moved for summary judgment, arguing that Berkshire's claims were barred by the statute of limitations.²³⁰ The trial court granted Logansport's motion, and Berkshire appealed.²³¹

On appeal, the court relied on *Reiswerg* for the proposition that a summary judgment respondent is not required to address issues unless the movant first addresses them and presents supporting evidence.²³² Because Logansport had asserted its statute of limitations defense in its answer to Berkshire's complaint, and because Berkshire's summary judgment motion did not implicate this defense, Logansport did not waive it by not raising it in opposition to Berkshire's summary judgment motion.²³³

H. Right to Jury Trial

In *Lucas v. U.S. Bank, N.A.*,²³⁴ the court applied the test laid out by the Indiana Supreme Court in *Songer v. Civitas Bank*²³⁵ to determine whether a right to a jury trial exists in a civil matter.²³⁶

223. 928 N.E.2d 587 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 824 (Ind. 2010).

224. 926 N.E.2d 26 (Ind. 2010).

225. *Berkshire*, 928 N.E.2d at 597.

226. *Id.* at 592.

227. *Id.* at 593.

228. *Id.*

229. *Id.* at 594.

230. *Id.*

231. *Id.*

232. *Id.* at 596.

233. *Id.* at 597.

234. 932 N.E.2d 239 (Ind. Ct. App. 2010).

235. 771 N.E.2d 61, 63 (Ind. 2002).

236. *Lucas*, 932 N.E.2d at 243-45.

U.S. Bank brought a mortgage foreclosure action against the Lucases.²³⁷ The Lucases responded by asserting counterclaims alleging that U.S. Bank violated the Truth in Lending Act (TILA) and the Real Estate Settlement and Practices Act (RESPA).²³⁸ The Lucases also alleged that the bank had committed conversion and deception, thereby entitling the Lucases to recover under the Indiana Civil Damages Statute.²³⁹ The Lucases also brought a third-party complaint against the loan servicer alleging violations of the TILA and RESPA, as well as conversion.²⁴⁰ The Lucases also made a request for a jury trial, which the trial court denied.²⁴¹

On appeal, the court applied the test established by the Indiana Supreme Court in *Songer*.²⁴² The court expressed the test as follows:

[T]o determine whether a party has the right to a jury trial in a civil case, we must first consider whether the essential features of the suit are equitable. If we determine that they are, we must then decide if there are distinct and severable legal causes of action such that Rule 38(A) requires a jury trial on those claims. Only if this court determines that the essential features of the suit are equitable and that there are no distinct and severable legal causes of action will the right to a jury trial be summarily extinguished.²⁴³

The court noted that mortgage foreclosure is almost always equitable in nature.²⁴⁴ However, the Lucases' claims for violations of the TILA and RESPA, as well as their conversion and deception claims, were distinct legal causes of action.²⁴⁵ Accordingly, the court reversed the trial court, holding that the Lucases had a right to a jury trial with respect to their legal claims against U.S. Bank and the loan servicer.²⁴⁶

I. Motion to Correct Error

In *Menard, Inc. v. Comstock*,²⁴⁷ the court reversed the trial court's decision to grant a motion to correct error and increase the amount of damages awarded by the jury.²⁴⁸

Comstock died from injuries he sustained when he slipped on ice outside a

237. *Id.* at 242.

238. *Id.*

239. *Id.* at 242-43 (citing IND. CODE § 34-24-3-1 (2011)).

240. *Id.*

241. *Id.*

242. *Id.* (citing *Songer v. Civitas Bank*, 771 N.E.2d 61, 63 (Ind. 2002)).

243. *Id.* at 244.

244. *Id.*

245. *Id.* at 244-45.

246. *Id.* at 245.

247. 922 N.E.2d 647 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 795 (Ind. 2010).

248. *Id.* at 651.

Menard's retail establishment.²⁴⁹ His wife brought wrongful death and survival actions against Menard.²⁵⁰ After trial, the jury awarded \$24,638.97 in gross damages but apportioned only 30% of the fault to Menard (with the remaining 70% split evenly between Comstock and his wife).²⁵¹ Accordingly, the jury awarded Comstock's widow \$8,212.99.²⁵² Comstock filed a motion to correct error, requesting that the trial court increase the damage award.²⁵³ The trial court granted the motion and entered final judgment with a damage award of \$149,240.71.²⁵⁴

On appeal, the court noted that Trial Rule 59(J)(5) affords the trial court the discretion to remedy an inadequate or excessive damages award by entering final judgment on the evidence for the amount of proper damages or order a new trial.²⁵⁵ However, the court cautioned that this option is only available when "the evidence is insufficient to support the verdict as a matter of law" and that "[t]rial courts must afford juries great latitude in making damage awards determinations."²⁵⁶ Moreover, the trial court should only reverse a jury's damages determination "when it is apparent from a review of the evidence that the amount of damages awarded by the jury is so small or so great as to clearly indicate that the jury was motivated by prejudice, passion, partiality, corruption or that it considered an improper element."²⁵⁷

The court considered the evidence available to the jury sufficient to support its verdict.²⁵⁸ Accordingly, the court reversed the trial court's order granting the motion to correct error and reinstated the jury's verdict.²⁵⁹

J. Relief from Judgment

In *Butler v. State*,²⁶⁰ the court reversed the trial court's denial of two motions to set aside a default judgment where the appellant had demonstrated mistake or excusable neglect and the existence of a meritorious defense.²⁶¹

Butler received traffic citations for speeding and operating his semi truck outside far two right lanes of a public highway.²⁶² The hearing on Butler's citations was initially set for January 14, 2009; however, the officer who issued

249. *Id.* at 648.

250. *Id.* at 648-49.

251. *Id.* at 649.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 649-50 (quoting IND. TRIAL R. 59(J)(5)).

256. *Id.* at 650 (citing *Childress v. Buckler*, 779 N.E.2d 546, 550 (Ind. Ct. App. 2002)).

257. *Id.* (quoting *Dee v. Becker*, 636 N.E.2d 176, 177 (Ind. Ct. App. 1994)).

258. *Id.* at 650-51.

259. *Id.* at 651.

260. 933 N.E.2d 33 (Ind. Ct. App. 2010).

261. *Id.* at 37.

262. *Id.* at 34.

the citations was unable to attend.²⁶³ Accordingly, the trial court continued the hearing to March 16, 2009.²⁶⁴ However, Butler alleged, the trial court's notice did not indicate the time for the hearing.²⁶⁵ By letter dated March 1, 2009, Butler requested a continuance of the March 16 hearing or, in the alternative, confirmation of the time the hearing was to take place.²⁶⁶ However, Butler received no response.²⁶⁷ Finally, on March 13, 2009, Butler called the court and was informed that the hearing was set to commence at 1:00 p.m.²⁶⁸ Therefore, Butler arrived at the courthouse at 12:50 p.m.—several hours too late for the hearing, which had actually started at 9:30 a.m.²⁶⁹ In his absence, the trial court entered default judgment against him.²⁷⁰ The trial court then denied Butler's two motions to set aside the default judgment.²⁷¹

On appeal, the court observed that a trial court may set aside a default judgment where the affected party establishes that mistake, surprise, or excusable neglect led to the entry of the default judgment.²⁷² The party seeking relief from the default judgment must also establish that he would have a meritorious defense, i.e., a *prima facie* showing that “the judgment would change and that the defaulted party would suffer an injustice if the judgment were allowed to stand.”²⁷³ Here, the court concluded that Butler had certainly demonstrated that the mistake, surprise, or excusable neglect led to the entry of the default against him.²⁷⁴ Further, the court determined that because Butler had denied the allegations in the citations, and because Butler could have offered various viable defenses to the allegations, Butler had adequately alleged a meritorious defense.²⁷⁵ Accordingly, the court reversed the trial court's denial of Butler's motions to set aside the default judgment entered against him.²⁷⁶

III. AMENDMENTS TO INDIANA RULES OF TRIAL PROCEDURE

By order dated September 21, 2010, the Indiana Supreme Court amended Indiana Rules of Trial Procedure 5, 9.2, 23, 39, 51, 53.1, 53.2, 53.3, 55, 59, 62, 72, 77 and 79 as follows:

1. The court amended Rule 5(B)(2) to change the phrase “on the

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 34-35.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* (citing IND. TRIAL R. 60(B)(1)).

273. *Id.* at 36 (quoting *Bunch v. Himm*, 879 N.E.2d 632, 637 (Ind. Ct. App. 2008)).

274. *Id.*

275. *Id.*

276. *Id.* at 37.

chronological case summary” to “in the Chronological Case Summary.”²⁷⁷

2. The court amended Rule 9.2(A) to provide, “When any pleading allowed by these rules is founded on an account, an Affidavit of Debt, in a form substantially similar to that which is provided in Appendix A-2 to these rules, shall be attached.”²⁷⁸
3. The court amended Rule 9.2(F) to include “an Affidavit of Debt.”²⁷⁹
4. The court amended Rule 23 by adding subsection (F), which reads:

(1) “Residual Funds” are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys’ fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the trial court from approving a settlement that does not create residual funds.

(2) Any order entering a judgment or approving a proposed compromise of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of residual funds, unless otherwise agreed. In matters where the claims process has been exhausted and residual funds remain, not less than twenty-five percent (25%) of the residual funds shall be disbursed to the Indiana Bar Foundation to support the activities and programs of the Indiana Pro Bono Commission and its pro bono districts. The court may disburse the balance of any residual funds beyond the minimum percentage to the Indiana Bar Foundation or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of the members of the certified class.²⁸⁰

5. The court amended Rule 39 to change the phrase “upon the chronological case summary” to “in the Chronological Case Summary.”²⁸¹
6. The court amended Rule 51 to read as follows:

(A) Preliminary Instructions. When the jury has been sworn the court shall instruct the jury in accordance with Jury Rule 20. Each party shall have reasonable opportunity to examine these preliminary instructions and state his specific objections thereto out of the presence of the jury and before any party has stated his case. (The court may of its own motion and, if requested by either party, shall

277. IND. TRIAL R. 5(B)(2).

278. IND. TRIAL R. 9.2(A).

279. IND. TRIAL R. 9.2(F).

280. IND. TRIAL R. 23(F).

281. IND. TRIAL R. 39(A).

reread to the jury all or any part of such preliminary instructions along with the other instructions given to the jury at the close of the case. A request to reread any preliminary instruction does not count against the ten [10] instructions provided in subsection (D) below.) The parties shall be given reasonable opportunity to submit requested instructions prior to the swearing of the jury, and object to instructions requested or proposed to be given.

(B) Final Instructions. The judge shall instruct the jury as to the law upon the issues presented by the evidence in accordance with Jury Rule 26.

(C) Objections and requested instructions before submission. At the close of the evidence and before argument each party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. No party may claim as error the giving of an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection. Opportunity shall be given to make the objection out of the hearing of the jury. The court shall note all instructions given, refused or tendered, and all written objections submitted thereto, shall be filed in open court and become part of the record. Objections made orally shall be taken by the reporter and thereby shall become a part of the record.

(D) Limit upon requested instructions. Each party shall be entitled to tender no more than ten [10] requested instructions, including pattern instructions, to be given to the jury; however, the court in its discretion for good cause shown may fix a greater number. Each tendered instruction shall be confined to one [1] relevant legal principle. No party shall be entitled to predicate error upon the refusal of a trial court to give any tendered instruction in excess of the number fixed by this rule or the number fixed by the court order, whichever is greater.

(E) Indiana Pattern Jury Instructions (Criminal)/Indiana Model Jury Instructions (Civil). Any party requesting a trial court to give any instruction from the Indiana Pattern Jury Instructions (Criminal)/Indiana Model Jury Instructions (Civil), prepared under the sponsorship of the Indiana Judges Association, may make such request in writing without copying the instruction verbatim, by merely designating the number thereof in the publication.²⁸²

7. The court amended Rule 53.1(C) to read as follows:

(C) Time of ruling. For the purposes of Section (A) of this rule, a

282. IND. TRIAL R. 51.

court is deemed to have set a motion for hearing on the date the setting is noted in the Chronological Case Summary, and to have ruled on the date the ruling is noted in the Chronological Case Summary.²⁸³

8. The court amended Rule 53.1(E) to change references from “chronological case summary” to “Chronological Case Summary.”²⁸⁴
9. The court amended Rule 53.2(C) to read as follows: “For the purpose of Section (A) of this rule, a court is deemed to have decided on the date the decision is noted in the Chronological Case Summary.”²⁸⁵
10. The court amended Rule 53.3(C) to read as follows:

(C) Time of ruling. For the purposes of Section (A) of this rule, a court is deemed to have set a motion for hearing on the date the setting is noted in the Chronological Case Summary, and to have ruled on the date the ruling is noted in the Chronological Case Summary.²⁸⁶

11. The court also amended Rule 53.3(D) to require that a trial court’s extension of time to rule on a motion to correct error must be noted in the Chronological Case Summary before expiration of the initial period for ruling.²⁸⁷
12. The court amended Rule 59(C) to provide that a motion to correct error must be filed within “thirty (30) days after the entry of a final judgment is noted in the Chronological Case Summary.”²⁸⁸
13. The court amended Rule 62(A) to provide that “[e]xecution may issue upon notation of a judgment in the Chronological Case Summary.”²⁸⁹
14. The court amended Rule 62(D) to include “other form of security approved by the court” as acceptable security for a stay upon appeal of a judgment.²⁹⁰
15. The court amended Rule 72(D) to require notice of an order or judgment immediately upon notation in the Chronological Case Summary.²⁹¹
16. The court amended Rule 77(B) to read as follows:

283. IND. TRIAL R. 53.1(C).

284. IND. TRIAL R. 53.1(E).

285. IND. TRIAL R. 53.2(C).

286. IND. TRIAL R. 53.3(C).

287. IND. TRIAL R. 53.3(D).

288. IND. TRIAL R. 59(C).

289. IND. TRIAL R. 62(A).

290. IND. TRIAL R. 62(D).

291. IND. TRIAL R. 72(D).

(B) Chronological Case Summary. For each case, the clerk of the circuit court shall maintain a sequential record of the judicial events in such proceeding. The record shall include the title of the proceeding; the assigned case number; the names, addresses, telephone and attorney numbers of all attorneys involved in the proceeding, or the fact that a party appears pro se with address and telephone number of the party so appearing; and the assessment of fees and charges (public receivables). Notation of judicial events in the Chronological Case Summary shall be made promptly, and shall set forth the date of the event and briefly define any documents, orders, rulings, or judgments filed or entered in the case. The date of every notation in the Chronological Case Summary should be the date the notation is made, regardless of the date the judicial event occurred. The Chronological Case Summary shall also note the entry of orders, rulings and judgments in the record of judgments and orders, the notation of judgments in the judgment docket . . . and file status (pending/decided) under section (G) of this rule. The Chronological Case Summary may be kept in a paper format, or microfilm, or electronically. The Chronological Case Summary shall be an official record of the trial court and shall be maintained apart from other records of the court and shall be organized by case number.²⁹²

17. The court amended Rule 79(D) to provide that the parties may have seven (7) days from notation in the Chronological Case Summary of the order granting a change of judge or an order of disqualification to agree to an eligible special judge.²⁹³
18. The court amended Rule 79(N)(4) to read as follows:

(4) All decisions, orders, and rulings shall be noted promptly in the Chronological Case Summary and, where appropriate, the Record of Judgments and Orders of the court where the case is pending and shall be served in accordance with Trial Rule 72(D). It is the duty of the special judge to effect prompt execution of this rule. A court is deemed to have ruled on the date the ruling is noted in the Chronological Case Summary.²⁹⁴

By order dated October 28, 2010, the Indiana Supreme Court amended the first sentence of Indiana Rule of Trial Procedure 55(B) to read as follows:

In all cases the party entitled to judgment by default shall apply to the court therefor; but no judgment by default shall be entered against a person (1) known to be an infant or incompetent unless represented in the

292. IND. TRIAL R. 77(B).

293. IND. TRIAL R. 79(D).

294. IND. TRIAL R. 79(N)(4).

action by a general guardian, committee, conservator, or other such representative who has appeared therein; or (2) entitled to the protections against default judgments provided by the Servicemembers Civil Relief Act, as amended (the “Act”) . . . unless the requirements of the Act have been complied with. See Ind. Small Claims Rule 10(B)(3).²⁹⁵

Finally, by order dated September 21, 2010, the Indiana Supreme Court amended Indiana Rule of Trial Procedure 79 to provide that “a person serving as a full-time judicial officer” is eligible to appointed as a special judge.²⁹⁶

295. IND. TRIAL R. 55(B).

296. IND. TRIAL R. 79(J).

INDIANA CONSTITUTIONAL DEVELOPMENTS: A QUIET YEAR

JON LARAMORE*

The most noteworthy aspect of developments in Indiana constitutional law during the survey period may be the absence of truly noteworthy developments. In the eight years the *Indiana Law Review* has surveyed this subject, this year had the fewest significant decisions to report.

As in recent years, Indiana's appellate courts have continued to refine unique state constitutional doctrines in areas such as search and seizure and multiple punishments double jeopardy, but no blockbuster cases arose in those areas. Nor were there many significant cases in other areas of state constitutional jurisprudence.

I. CASES ADDRESSING STRUCTURAL PROVISIONS OF THE INDIANA CONSTITUTION

The most significant case addressing the structural provisions of the Indiana Constitution, and likely the most noteworthy state constitutional case in the public eye during the survey period, was *League of Women Voters of Indiana, Inc. v. Rokita*,¹ a case challenging Indiana's voter identification statute on state constitutional grounds.² Indiana's restrictive voter identification law had already withstood a federal constitutional challenge that was ultimately adjudicated in the U.S. Supreme Court.³

Indiana's statute requires those who vote in person at the polls on election day to present a government-issued photo identification card with an expiration date.⁴ In its opinion, the Indiana Supreme Court pointed out that the plaintiffs in this case presented a facial challenge to the voter identification law and that the Indiana Supreme Court had previously expressed its wariness of such challenges.⁵ The Indiana Supreme Court first rejected the plaintiffs' claim that

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1. 929 N.E.2d 758 (Ind. 2010).

2. The Indiana Court of Appeals had ruled that the voter identification law was unconstitutional under the equal privileges and immunities clause of the state constitution because its different treatment of mail-in absentee voters was not reasonably related to inherent differences between mail-in absentee voters and in-person voters. *League of Women Voters of Ind., Inc. v. Rokita*, 915 N.E.2d 151 (Ind. Ct. App. 2009), *trans. granted and opinion vacated*, 929 N.E.2d 783 (unpublished table opinion) (2010); *see also* Jon Laramore, *Indiana Constitutional Developments: Vitality for the Ex Post Facto Clause, But Not the Education Clause*, 43 IND. L. REV. 665, 686-88 (2010).

3. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008).

4. *Rokita*, 929 N.E.2d at 765.

5. *See id.* at 760-61; *see also* *Price v. State*, 622 N.E.2d 954, 958 (Ind. 1993) (stating that

the voter identification law violated article 2, section 2 by establishing new qualifications for voting.⁶ New qualifications may be established only by constitutional amendment, not by legislation.⁷ The plaintiffs also argued that the voter identification law was a new property qualification because it is difficult and expensive for some voters to obtain the required identification, which often may be acquired only upon showing a birth certificate and other verification that some persons may not have readily available.⁸ In rejecting this argument, the supreme court concluded that the voter identification law did not establish new qualifications for voting; rather, the law provided an additional system for verifying voter registration.⁹ “The voter qualifications established in [s]ection 2 of [a]rticle 2 relate to citizenship, age, and residency,” the court wrote.¹⁰ “Requiring qualified voters to present a specified form of identification is not in the nature of such a personal, individual characteristic or attribute but rather functions merely as an election regulation to verify the voter’s identity.”¹¹

The court next addressed the plaintiffs’ argument that the voter identification law violates article 2, section 2 because it is “not uniformly applicable to all voters.”¹² The law applies only to those who vote in person at the polls on election day, not to those who vote by mail-in absentee ballots or those who live in a “state licensed care facility” that also serves as their polling place.¹³ The court acknowledged these differences in application but concluded that they “do not undermine the uniformity of the photo identification requirement for in-person voting. They apply only with respect to special alternative voting accommodations in which the photo identification requirement would be impracticable, unnecessary, or of doubtful utility.”¹⁴

The court also rejected challenges to the statute under the equal privileges and immunities clause—article 1, section 23.¹⁵ The plaintiffs assailed the statute under this provision because it applies only to in-person voters, not to absentee mail-in voters or those who live in state licensed care facilities that are also their polling places.¹⁶ Applying its longstanding formula, the court looked first at

“[o]nce an Indiana constitutional challenge is properly raised, a court should focus on the actual operation of the statute at issue and refrain from speculating about hypothetical applications”).

6. *Rokita*, 929 N.E.2d at 767.

7. *Id.*

8. *Id.* at 763-65, 767.

9. *Id.* at 767.

10. *Id.*

11. *Id.*

12. *Id.*

13. IND. CODE § 3-11-8-25.1(a), (e) (2010) (discussing in-person and licensed care facility voting); *id.* § 3-11-10-1.2 (discussing absentee voting).

14. *Rokita*, 929 N.E.2d at 768.

15. *Id.* at 769-72. Article 1, section 23 states: “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.” IND. CONST. art. 1, § 23.

16. *Rokita*, 929 N.E.2d at 770.

whether any disparate treatment was reasonably related to inherent characteristics distinguishing the disparately treated classes, then at whether the preferential treatment was uniformly applicable to all those similarly situated.¹⁷ The court concluded that there are sufficient inherent differences between in-person voters and absentee voters to support different treatment.¹⁸ Because absentee voters do not appear before any official who can check their identification, the court determined that no voter identification requirement would serve any purpose.¹⁹ The court also did not find that the exception for those living in care facilities created a problem under section 23 because it was at most “a minor and insubstantial disparity.”²⁰ But the court took pains to explain that it was rejecting only the plaintiffs’ facial challenge and that any individual who was actually burdened by the voter identification statute still had the right to assert an individual, as-applied claim.²¹

Justice Boehm dissented. He characterized the majority’s decision as weighing the problems some voters have in obtaining voter identification against the “perceived benefits in the integrity of the election.”²² He characterized the issue not in terms of what is the proper balance but as “who gets to resolve that issue under the Indiana Constitution.”²³ He noted the well-established principle that voter qualifications cannot be prescribed by the general assembly, but only by the constitution itself, and concluded, “I think both precedent and the language of the Indiana Constitution dictate that the voter ID requirement is an unauthorized qualification for casting a ballot.”²⁴

Justice Boehm went on to explain his view that a significant number of people had difficulty obtaining the identification required by the law and that courts “ordinarily give wide latitude to legislative judgment on matters of reasonable relationship in classifications created by statute. But any limitation on the right to vote surely strikes at one of the core values embodied in the Indiana Constitution.”²⁵ He opined that because of the importance of the right to vote, the judiciary must exercise special care in preserving it, especially when one of the elected branches takes actions that impinge upon it.²⁶ Justice Boehm concluded that the allegations in the complaint—that many voters lacked the requisite identification and some had been prevented from voting as a result—were sufficient to withstand a motion to dismiss.²⁷

17. *Id.* (citing *Collins v. Day*, 644 N.E.2d 72, 77, 80 (Ind. 1994)).

18. *Id.* at 770-71.

19. *Id.* at 771.

20. *Id.* at 771-72.

21. *Id.* at 769.

22. *Id.* at 773 (Boehm, J., dissenting).

23. *Id.*

24. *Id.* at 774.

25. *Id.* at 775.

26. *See id.*

27. *Id.* at 776.

In *Wilkes v. State*,²⁸ a capital case also focused on a structural provision, the Indiana Supreme Court looked at a separation of powers issue. Wilkes argued that the statutorily mandated use of special verdict forms in capital cases violated separation of powers because it conflicted with Indiana Trial Rule 49, which eliminated special verdicts.²⁹ He also argued that the statutory mandate violated separation of powers by intruding on the judicial sphere.³⁰ The supreme court rejected the claims, holding that the document required by statute is “qualitatively different from the special verdicts to which Trial Rule 49 refers”³¹—the statutorily required form does not ask for preliminary or subsidiary findings but solicits the jury’s findings as to the ultimate facts to be resolved in a capital case.³² Moreover, those findings are required by the Sixth Amendment in cases addressing the death penalty.³³

II. DECISIONS ADDRESSING INDIVIDUAL RIGHTS PROVISIONS OF THE INDIANA CONSTITUTION

A. *The Ex Post Facto Clause*

Indiana’s appellate courts continued their recent trend of applying the ex post facto clause in article 1, section 24, most often in the context of laws applying penalties to persons convicted of sex offenses.³⁴ The Indiana Supreme Court addressed this clause in *Hevner v. State*,³⁵ a case involving a person convicted of possessing child pornography. At the time of Hevner’s offense, the statute had required individuals to register as sex offenders only after they had committed a second offense; after Hevner committed his crime, but before he was sentenced, the statute was amended so that all sex offenders had to register after their first offense.³⁶ Hevner’s sentencing court ordered him to register and declared him to be “subject to the [r]ules for [s]ex [o]ffenders” in the county where he was convicted.³⁷

The supreme court applied the analysis it first unveiled in *Wallace v. State* in 2009 and found that the factors implicated by that test led to the conclusion that the additional registration requirement applied to Hevner was punitive in effect and therefore violated the ex post facto clause of the Indiana

28. 917 N.E.2d 675 (Ind. 2009), *reh’g denied*.

29. *Id.* at 686-87.

30. *See id.* at 687.

31. *Id.*

32. *Id.*

33. *Id.*

34. *See Laramore, supra* note 2, at 665-73.

35. 919 N.E.2d 109 (Ind. 2010).

36. *Compare* IND. CODE § 5-2-12-4(a)(13) (2005), *with* IND. CODE § 11-8-8-4.5(a)(13) (2007). The law is currently codified at IND. CODE § 11-8-8-4.5(a)(13) (2010).

37. *Hevner*, 919 N.E.2d at 110 (citation omitted).

Constitution.³⁸ The supreme court vacated the portion of Hevner's sentence requiring him to register as a sex offender; it left certain other conditions in place as reasonable conditions of probation.³⁹

In *Greer v. Buss*,⁴⁰ the Indiana Court of Appeals addressed a claim that the Indiana Department of Correction had unconstitutionally imposed a policy requiring persons convicted of certain sex and violent offenses to register for an additional ten-year period once their initial ten-year period on the sex and violent offender registry had expired.⁴¹ The policy apparently required any person convicted of any offense whatsoever after the person's initial ten-year registration period had expired to register for a second ten-year period.⁴²

The court of appeals reversed the trial court's dismissal of the action and directed the entry of declaratory relief in plaintiffs' favor.⁴³ Also relying on *Wallace*, the court of appeals ruled that the department's policy violated the ex post facto clause of the Indiana Constitution by imposing a punishment that had not been in effect when the plaintiffs committed the offenses of which they were convicted.⁴⁴ The court of appeals rejected the plaintiffs' claim that the trial court should have certified a class of plaintiffs, but the declaratory relief ordered against the Indiana Department of Correction effectively provided classwide relief.⁴⁵

*Brogan v. State*⁴⁶ also grew out of the *Wallace* line of cases. Brogan filed a motion arguing that under *Wallace*, he was not required to register as a sex offender because the applicable statute did not require registration at the time he committed his crime.⁴⁷ He filed the motion in the court where he was convicted, and that court determined that it lacked jurisdiction.⁴⁸ The court of appeals affirmed the dismissal for lack of jurisdiction, pointing to a statute that permitted Brogan to file in the county where he resided.⁴⁹

38. *Id.* at 111-13 (citing *Wallace v. State*, 905 N.E.2d 371, 378-84 (Ind. 2009), *reh'g denied*).

39. *Id.* at 113. In a similar case, *Blakemore v. State*, 925 N.E.2d 759 (Ind. Ct. App. 2010), the Indiana Court of Appeals vacated the requirement that Blakemore register as a sex offender because no such requirement appeared in the relevant statute at the time he committed his crime. *Id.* at 763. The State argued that Blakemore waived this argument because he pled guilty, but the court of appeals "decline[d] to hold Blakemore 'agreed' to requirements the Code did not impose when he entered into that agreement." *Id.* at 762.

40. 918 N.E.2d 607 (Ind. Ct. App. 2009).

41. *Id.* at 610.

42. *See id.* at 611.

43. *Id.* at 619.

44. *Id.* at 617.

45. *Id.* at 618-19.

46. 925 N.E.2d 1285 (Ind. Ct. App. 2010).

47. *Id.* at 1287.

48. *Id.*

49. *Id.* at 1291 & n.10.

B. Open Courts

*Henderson v. Henderson*⁵⁰ was an appeal from a marriage dissolution. At the final hearing, the trial judge asked if the provisional order could be the framework for the final judgment, and the mother agreed that it could.⁵¹ The father, by contrast, said that he wanted custody of the children.⁵² The trial court heard no evidence and directed the mother's counsel to prepare an order tracking the provisional order.⁵³ The court of appeals concluded that the trial court's conduct violated the open courts clause of article 1, section 12.⁵⁴ In the appellate court's view, the trial court deprived the husband of his right to present his case by failing to take evidence before deciding a disputed issue.⁵⁵ The court of appeals vacated the dissolution decree and remanded the case for a new hearing.⁵⁶

C. Bail

The Indiana Court of Appeals analyzed issues arising under the bail clause of the Indiana Constitution in two cases. In *Reeves v. State*,⁵⁷ the defendant was accused of defrauding several churches in a Ponzi scheme.⁵⁸ The trial court set bail at \$1,500,000 (with no ten percent cash bail) on the ten charged counts of securities fraud and made no findings on the nine statutorily prescribed considerations.⁵⁹ The court of appeals concluded that this amount was excessive bail prohibited by article 1, section 16, basing its decision on the trial court's lack of findings to support the number and the fact that the number was ten times the amount recommended by local rule.⁶⁰ The court of appeals was critical of the trial court's failure to make findings, stating that it made review difficult.⁶¹

In *Rohr v. State*,⁶² the trial court denied bail altogether on a charge of murdering a child by engaging in frequent corporal punishment.⁶³ Rohr had been convicted of the murder, but the conviction was reversed due to the wrongful

50. 919 N.E.2d 1207 (Ind. Ct. App. 2010).

51. *Id.* at 1210.

52. *Id.*

53. *Id.*

54. *Id.* at 1213. Article 1, section 12 states, in relevant part: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law." IND. CONST. art. 1, § 12.

55. *Henderson*, 919 N.E.2d at 1213.

56. *Id.*

57. 923 N.E.2d 418 (Ind. Ct. App.), *on subsequent appeal*, 938 N.E.2d 10 (Ind. 2010).

58. *Id.* at 419.

59. *Id.* at 420-21.

60. *Id.* at 421-22.

61. *See id.*

62. 917 N.E.2d 1277 (Ind. Ct. App. 2009).

63. *Id.* at 1277-78.

exclusion of certain testimony, and the case was set for retrial.⁶⁴ Article 1, section 17 states, “Offenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong.”⁶⁵ The trial judge had expressed strong skepticism regarding Rohr’s bail evidence, which consisted of the victim’s mother’s statements exculpating Rohr; in fact, she indicated that the victim’s mother (also charged with the murder) had changed her story several times already in testimony.⁶⁶ Also, the Indiana Supreme Court in the prior appeal had found sufficient evidence that Rohr committed the murder.⁶⁷ The court of appeals concluded that the trial court did not abuse its discretion in denying bail.⁶⁸

D. Venue

The Indiana Court of Appeals addressed the constitutional provision guaranteeing venue in the county where a crime allegedly was committed in *Neff v. State*.⁶⁹ Neff was convicted of child solicitation for communicating online to set up a sexual liaison with someone purporting to be a twelve-year-old girl.⁷⁰ Neff used a computer in Madison County and set up the liaison to occur in Hamilton County.⁷¹ Neff was arrested in Hamilton County at the site of the meeting he had set up.⁷² He appealed, arguing that he committed no illegal act in Hamilton County. Because he had sent all online communications while in Madison County, Neff argued that his conviction violated the provision of article 1, section 13 stating that an accused has a right to a trial “in the county in which the offense shall have been committed.”⁷³ The court of appeals reversed the conviction because the crime was completed when Neff sent the email solicitation from his Madison County computer.⁷⁴

The court of appeals went on to rule, however, that Neff could be tried again because there was no double jeopardy bar to retrial.⁷⁵ Venue was not an element of Neff’s crime, so the reversal did not indicate the State’s failure to prove an element.⁷⁶ Moreover, believing that there should be incentives for defendants to raise improper venue before trial, the court held that not allowing retrial in these

64. *Id.* at 1278.

65. IND. CONST. art. 1, § 17.

66. *Rohr*, 917 N.E.2d at 1278.

67. *Rohr v. State*, 866 N.E.2d 242, 249 (Ind. 2007).

68. *Rohr*, 917 N.E.2d at 1282.

69. 915 N.E.2d 1026 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 792 (Ind. 2010).

70. *Id.* at 1029-30.

71. *Id.* at 1029.

72. *Id.* at 1030.

73. *Id.* at 1032; *see* IND. CONST. art. 1, § 13.

74. *Neff*, 915 N.E.2d at 1034.

75. *Id.* at 1036-37.

76. *Id.*

circumstances would encourage defendants to back-pocket the venue issue and provide incentives for multiple trials.⁷⁷

E. Jury as the Judge of the Law and the Facts in Criminal Cases

In *Sample v. State*,⁷⁸ the Indiana Supreme Court vacated a habitual offender enhancement based on a violation of article 1, section 19's directive that "[i]n all criminal cases whatever, the jury shall have the right to determine the law and the facts."⁷⁹ After being convicted of attempted murder and other charges, the jury heard evidence that Sample's sentence should be enhanced because he was a habitual offender—that is, he had two prior unrelated felony convictions before the current conviction.⁸⁰ The trial court had instructed the jury that it "must" find Sample to be a habitual offender if the State proved beyond a reasonable doubt the existence of the two prior unrelated convictions.⁸¹ The supreme court found the instruction unconstitutional because it "prevented the jury from making an independent and separate decision on habitual offender status"⁸² (and the jury was not otherwise instructed on its role as the judge of the law).⁸³ Article 1, section 19 gives the jury independent authority to determine "whether the defendant is a habitual offender" even if the State has proven the prior offenses beyond a reasonable doubt.⁸⁴ The supreme court remanded the case for a new habitual offender proceeding.⁸⁵

F. Right to Trial by Jury

A tenant subject to eviction proceedings asserted her right to trial by jury in *Bishop v. Housing Authority of South Bend*.⁸⁶ Her landlord sought to evict her because of criminal acts of one of the children in her household.⁸⁷ When she did not move out, the landlord sued, and Bishop sought a jury trial.⁸⁸ The trial court

77. *See id.* at 1036.

78. 932 N.E.2d 1230 (Ind. 2010).

79. *Id.* at 1233-34; *see* IND. CONST. art. 1, § 19.

80. *Sample*, 932 N.E.2d at 1231-32.

81. *Id.* at 1231-32 & n.1.

82. *Id.* at 1232 (quoting *Parker v. State*, 898 N.E.2d 737, 742 (Ind. 1998)).

83. *Id.* at 1232-33.

84. *Id.* at 1232 (quoting *Parker*, 698 N.E.2d at 742).

85. *Id.* at 1234. In *Beattie v. State*, 924 N.E.2d 643 (Ind. 2010), the Indiana Supreme Court reiterated its longstanding position that inconsistent verdicts are insulated from appellate review. *Id.* at 644. As one of the reasons supporting this doctrine, the supreme court cited article 1, section 19 and stated that rather than showing a misunderstanding by the jury, inconsistent verdicts "more likely [show] that the jury chose to exercise lenity, refusing to find the defendant guilty of one or more additionally charged offenses, even if such charges were adequately proven by the evidence." *Id.* at 648.

86. 920 N.E.2d 772, 778 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 819 (Ind. 2010).

87. *Id.* at 776.

88. *Id.*

denied her claim for a jury on the determination of immediate possession⁸⁹ and ordered immediate possession to the landlord based on evidence at a hearing, finding it “more likely than not” (the statutory standard) that the lease had been violated.⁹⁰ The court of appeals affirmed, finding no violation of article 1, section 20, which provides the right to jury trial.⁹¹ The court of appeals concluded that although the statute permits a jury trial on the ultimate issue, the trial court’s denial of a jury on the preliminary determination of possession did not violate the Indiana Constitution.⁹² In the court’s opinion, “[t]he statutory [preliminary] hearing manifests the inherent power of trial courts to intercede at an early stage—to make a preliminary decision before what could thereafter be a lengthy judicial process.”⁹³

In *Cutter v. Classic Fire & Marine Insurance Co.*,⁹⁴ the court of appeals concluded that a statutory procedure to determine claims in the estate of an insolvent insurer without any jury trial did not violate article 1, section 20.⁹⁵ The court of appeals ruled that the claims at issue were entirely equitable, as claims in receivership were equitable before June 18, 1852 (the date the Indiana Constitution fixes for determining whether a right to jury trial is available).⁹⁶

G. Free Expression in the Context of Criminal Acts

The Indiana Court of Appeals addressed two cases raising the free expression clause—article 1, section 9—in the context of prosecutions for disorderly conduct.⁹⁷ The applicable doctrine arose in *Price v. State*.⁹⁸ In this 1993 case, the Indiana Supreme Court reversed a disorderly conduct conviction, finding that the defendant engaged in protected conduct—in the form of complaints about law enforcement conduct—and that he did so in a way that did not disturb others more than fleetingly.⁹⁹

89. See IND. CODE §§ 32-30-3-1 through -5 (2010).

90. *Bishop*, 920 N.E.2d at 777-78.

91. *Id.* at 779-80. Article 1, section 20 states that “[i]n all civil cases, the right of trial by jury shall remain inviolate.” IND. CONST. art. 1, § 20. This provision has been held to protect the right to a jury trial on any claim that was triable to a jury on June 18, 1852. See IND. TRIAL R. 38(A).

92. *Bishop*, 920 N.E.2d at 779-80.

93. *Id.* at 779.

94. 926 N.E.2d 1067 (Ind. Ct. App. 2010). The author of this article was counsel for the liquidator in this insurance liquidation case.

95. *Id.* at 1085.

96. *Id.* at 1084-85.

97. Article 1, section 9 states: “No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible.” IND. CONST. art. 1, § 9.

98. 622 N.E.2d 954 (Ind. 1993).

99. *Id.* at 964.

In *Dallaly v. State*,¹⁰⁰ the defendant was walking along a road, and police stopped him when they believed they saw him take something from his mouth and throw it on the ground.¹⁰¹ He resisted providing identification, became “animated,” and shouted curses at the police.¹⁰² When he attempted to leave the scene, he was arrested.¹⁰³ Dallaly argued that his disorderly conduct conviction should be reversed because he was engaging in protected free speech; he claimed that his comments were “clearly directed at the . . . legality and appropriateness of the police action.”¹⁰⁴ The court of appeals concluded that although his speech began as political, “the bulk of Dallaly’s speech was . . . an abuse of the right to free speech.”¹⁰⁵ His “loud yelling, obstructed . . . the police” and “created a traffic hazard,” constituting “more than a mere fleeting annoyance.”¹⁰⁶ Because, on balance, his speech was not primarily political, his conviction was affirmed.¹⁰⁷

*Barnes v. State*¹⁰⁸—the other free expression case—arose from a domestic disturbance, and police officers threatened to arrest Barnes unless he stopped yelling at them.¹⁰⁹ When Barnes re-entered his home, he told the police they could not enter.¹¹⁰ Barnes shoved an officer who attempted to push his way into the home, and Barnes was subsequently tasered, requiring hospitalization.¹¹¹ He argued that his disorderly conduct conviction should be reversed because he was engaging in political speech.¹¹² The officers involved testified that after Barnes proved his identity, he yelled at them to leave because they were not needed.¹¹³ The court of appeals concluded that his speech was therefore political.¹¹⁴ The court of appeals also concluded that Barnes’s loud speech was “[relatively] brief in duration,” and if it disturbed anyone, the disturbance was brief.¹¹⁵ The court of appeals reversed his conviction, concluding “the State failed to prove that Barnes’s political expression rose to the level of disorderly conduct.”¹¹⁶

100. 916 N.E.2d 945 (Ind. Ct. App. 2009).

101. *Id.* at 948. It turned out to be an apple core. *Id.*

102. *Id.* at 948-49.

103. *Id.* at 949.

104. *Id.* at 951.

105. *Id.* at 954.

106. *Id.*

107. *Id.*

108. 925 N.E.2d 420 (Ind. Ct. App. 2010), *trans. granted, opinion vacated*, IND. R. APP. P. 58.

109. *Id.* at 423.

110. *Id.*

111. *Id.*

112. *Id.* at 426.

113. *Id.* at 427.

114. *Id.* at 427-28.

115. *Id.* at 428-29.

116. *Id.* at 429-30. The court also vacated his conviction for battery on a law enforcement officer (arising from shoving the officer who pushed his way into the house), ordering a new trial. *Id.* at 426. The court of appeals concluded that the trial court erred in not instructing the jury on

H. Double Jeopardy Clause

The Indiana Court of Appeals continued to develop the doctrines emanating from Indiana's double jeopardy clause in article 1, section 14, especially as that provision relates to "multiple punishments" double jeopardy—situations in which several convictions result from one action or brief series of actions.¹¹⁷ Not only does Indiana apply the same elements test (the federal *Blockburger* test)¹¹⁸ to evaluate double jeopardy in this context, but it also applies Indiana's own "same evidence" test.¹¹⁹ This test determines whether each of defendant's convicted crimes is proved with at least one evidentiary element that proves no other crime for which he is convicted.¹²⁰

In *Calvert v. State*,¹²¹ the Indiana Court of Appeals vacated one conviction on double jeopardy grounds.¹²² Calvert was convicted of possession of a firearm as a serious violent felon (a Class B felony) and possession of a sawed-off shotgun (a Class D felony).¹²³ The court of appeals ruled that each of the convictions was "established by proof of one and the same act: his constructive possession of the sawed-off shotgun in the vehicle he was driving."¹²⁴ Indiana's "same evidence" test was violated because precisely the same evidence supported both convictions and because the single fact proving the D felony conviction also was used to prove the B felony conviction.¹²⁵ The court of appeals therefore vacated the lesser conviction.¹²⁶

In *Baugh v. State*,¹²⁷ the court of appeals addressed double jeopardy in the context of the continuing crime doctrine. Baugh, age twenty-six, had sexual

Barnes's statutory right to reasonably resist the unlawful entry of police into his home. *Id.* at 424-26.

117. See, e.g., *Guyton v. State*, 771 N.E.2d 1141, 1148-49 (Ind. 2002) (Boehm, J., concurring) (discussing multiple punishments prong of double jeopardy analysis); see IND. CONST. art. 1, § 14.

118. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

119. See *Richardson v. State*, 717 N.E.2d 32, 48 (Ind. 1999).

120. See *Blockburger*, 284 U.S. at 304; *Richardson*, 717 N.E.2d at 48.

121. 930 N.E.2d 633 (Ind. Ct. App. 2010).

122. *Id.* at 642-43.

123. *Id.* at 638. Calvert was also convicted of attempted robbery, a Class B felony. *Id.*

124. *Id.* at 642.

125. *Id.*

126. Judge Kirsch dissented, arguing that the court "misconstrue[d] the actual evidence test set forth by our [s]upreme [c]ourt in *Richardson v. State*." *Id.* at 645 (Kirsch, J., dissenting) (citation omitted). He argued that Calvert committed one crime by possessing a firearm—any firearm, not specifically a sawed-off shotgun—as a serious violent felon, and that he committed another crime by possessing a sawed-off shotgun, which is a firearm that is specifically banned from possession. *Id.* at 645-46. He also argued that the facts of this case showed no violation of the same evidence (or, as he put it, "actual evidence") test. *Id.* at 646.

127. 926 N.E.2d 497 (Ind. Ct. App.), *summarily aff'd in relevant part, vacated in part*, 933 N.E.2d 1277 (Ind. 2010).

relations on multiple occasions with a fourteen-year-old girl over a period of several months.¹²⁸ He was convicted of two counts of sexual misconduct with a minor.¹²⁹ He argued that the two convictions violated double jeopardy because his actions constituted a continuous crime, and he could not be punished twice for one continuous crime.¹³⁰ The court of appeals rejected the argument, finding that his actions took place on separate occasions over a period of months, not in a compressed time and place amounting to a single crime.¹³¹

Complex rules regarding acquittal and conviction of lesser included offenses influenced the court of appeals's application of double jeopardy principles in *Hoover v. State*.¹³² Hoover was charged with murder, felony murder, and felony robbery (which was the predicate offense for felony murder).¹³³ He was acquitted of murder and convicted of robbery, and the jury hung on the felony murder charge.¹³⁴ Hoover argued that Indiana double jeopardy principles precluded his retrial on felony murder, and the court of appeals agreed.¹³⁵ The court concluded that the murder acquittal did not bar retrial on felony murder because the acquittal could have been based on a conclusion that Hoover lacked mens rea for murder; thus, retrial would not require proof of a fact necessarily found in Hoover's favor as part of the murder acquittal.¹³⁶ But Hoover also was convicted of robbery, and when felony murder results from a killing in the course of a robbery, robbery is a lesser included offense of felony murder.¹³⁷

The court of appeals affirmed the trial court on the robbery conviction but remanded the case to "dismiss the felony-murder count with prejudice."¹³⁸ The Federal Constitution does not preclude retrial in these circumstances.¹³⁹ A defendant convicted of a lesser included offense cannot be retried on the greater offense without violating double jeopardy principles under Indiana law. But double jeopardy principles in Indiana's statutes bar retrial: Indiana Code section 35-41-4-3 bars a prosecution if there was a former prosecution based on the same facts for the same offense resulting in conviction of a lesser included offense.¹⁴⁰ The court explained, "By its plain language, the statute bars any retrial on a greater offense when the defendant has been convicted of the lesser-included, even where a first jury considered but deadlocked on the greater charge."¹⁴¹

128. *Id.* at 499.

129. *Id.*

130. *Id.* at 502.

131. *Id.* at 502-03.

132. 918 N.E.2d 724 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 795 (Ind. 2010).

133. *Id.* at 728-29.

134. *Id.* at 729.

135. *Id.* at 733, 736.

136. *Id.* at 734.

137. *Id.*

138. *Id.* at 736.

139. *Id.* at 734-35.

140. *Id.* at 735; *see* IND. CODE § 35-41-4-3(a)(1) (2010).

141. *Hoover*, 918 N.E.2d at 736.

I. Search and Seizure

Indiana's appellate courts also continued to refine Indiana's distinct search and seizure analysis under article 1, section 9. The development of this doctrine has been case-by-case, in true common law fashion. Indiana's analysis turns on the reasonableness of law enforcement conduct and mandates balancing the following factors: the degree the search or seizure disrupts the suspect's normal activities; the degree of suspicion or knowledge that a crime was committed; and the extent of law enforcement needs.¹⁴²

The court of appeals also addressed two questions of first impression under article 1, section 11 during the survey period. It held that the federal doctrine of attenuation does not apply to suppression analysis under the Indiana Constitution.¹⁴³ It also held that Indiana's unique *Pirtle* rule—requiring officers to tell those in custody that they have a right to counsel before consenting to a search—does not apply when the officer asks for consent to do a pat-down type search.¹⁴⁴

The Indiana Supreme Court applied section 9 in three cases, often performing a Fourth Amendment analysis as well. In *Shotts v. State*,¹⁴⁵ the defendant was arrested for an outstanding warrant from Alabama. Officers found an unlicensed handgun when they arrested him, leading to additional charges.¹⁴⁶ The arrest was based on information in a national criminal database.¹⁴⁷ The defendant argued that there was no probable cause to arrest him because the Alabama warrant was based on a facially deficient affidavit.¹⁴⁸ The Indiana Supreme Court rejected the defendant's Fourth Amendment claim because the law enforcement officers' actions were within the good faith exception.¹⁴⁹ In its Indiana constitutional analysis, the supreme court also found that the officers acted on a reasonable belief that there was probable cause to arrest the defendant, and the degree of intrusion was justified by the interests at stake.¹⁵⁰

In *Duran v. State*,¹⁵¹ the supreme court addressed the police's forceful entry into a defendant's home when it was based solely on uncorroborated information from an anonymous source. Police officers did not locate the suspect; rather, they found wholly unrelated evidence belonging to the defendant.¹⁵² The

142. *Litchfield v. State*, 824 N.E.2d 356, 359, 361 (Ind. 2005), *on appeal after remand*, 849 N.E.2d 170 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 589 (Ind. 2006).

143. *Trotter v. State*, 933 N.E.2d 572, 582-83 (Ind. Ct. App. 2010).

144. *Wilkerson v. State*, 933 N.E.2d 891, 894 (Ind. Ct. App. 2010).

145. 925 N.E.2d 719 (Ind. 2010).

146. *Id.* at 721-22.

147. *Id.* at 721.

148. *Id.* at 722.

149. *Id.* at 724-26.

150. *Id.* at 726-27.

151. 930 N.E.2d 10 (Ind. 2010).

152. *Id.* at 12-14.

supreme court's account of the officers' attempt to find a suspect portrayed police as clueless—the officers broke down the door of the wrong apartment after someone they happened to encounter on the street said the suspect might be in that apartment.¹⁵³ The police did not find the suspect, but they found cocaine and arrested Duran for possession.¹⁵⁴ The supreme court concluded that the search violated both the Fourth Amendment and article 1, section 11 of the Indiana Constitution.¹⁵⁵ On the state claims, the supreme court concluded that the police could not reasonably have believed that the suspect they sought was in the location they broke into because they relied on a blind tip from an anonymous informant.¹⁵⁶ The degree of intrusion was high; it involved breaking into a person's home with drawn weapons.¹⁵⁷ The court thus concluded that the search was unreasonable under the Indiana Constitution and required that the evidence be suppressed.¹⁵⁸

The Indiana Supreme Court also conducted a fact-sensitive analysis in *State v. Hobbs*,¹⁵⁹ where the State appealed a trial court's grant of a motion to suppress. Here, the officers had a warrant to arrest Hobbs, and they did so at his workplace.¹⁶⁰ When Hobbs did not consent to the search of his car, the officers called in a drug-sniffing dog that indicated that illegal drugs were present.¹⁶¹ The police then searched the car without a warrant and found a quantity of marijuana.¹⁶² The supreme court held that the search was valid under the Fourth Amendment.¹⁶³ Applying the Indiana Constitution, the supreme court concluded that the search was reasonable.¹⁶⁴ Once the dog indicated the presence of drugs, the officers had a high degree of confidence that a crime had been committed, and they had to address the situation before Hobbs's car could be moved.¹⁶⁵ The search was minimally intrusive because Hobbs was already under arrest for a different crime and was not disturbed by the search.¹⁶⁶ The court was unanimous on the Indiana constitutional issue¹⁶⁷, but two justices dissented on the Fourth Amendment issue.¹⁶⁸

153. *Id.* at 17.

154. *Id.* at 14.

155. *Id.* at 14-19.

156. *Id.* at 17-18.

157. *Id.* at 18-19.

158. *Id.* at 19.

159. 933 N.E.2d 1281 (Ind. 2010).

160. *Id.* at 1284.

161. *Id.*

162. *Id.*

163. *Id.* at 1286-87.

164. *Id.* at 1287.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 1287-88 (Sullivan, J., dissenting) (opining that the facts of the case "should render the automobile exception unavailable").

In *Lindsey v. State*,¹⁶⁹ the court addressed a vehicle search. An officer saw Lindsey enter a store, brandish a weapon, and run out of the store shortly thereafter.¹⁷⁰ The police subsequently arrested him.¹⁷¹ One officer approached the car Lindsey had run toward after emerging from the store.¹⁷² The car had tinted windows obstructing the officer from seeing inside, and its door was ajar.¹⁷³ The officer opened the door to ensure no one else was inside and saw a police scanner, a holster, and a plastic bag.¹⁷⁴ The officer obtained a warrant before further searching the car.¹⁷⁵ The court of appeals concluded that the search—consisting of opening the car door wider and looking inside—was not unreasonable.¹⁷⁶ In this situation, the police had a high degree of certainty that Lindsey had violated the law, law enforcement's need to locate any possible accomplice was high, and the degree of intrusion was minimal because the car door was already partly open.¹⁷⁷

The court of appeals addressed the good faith exception in *Rice v. State*,¹⁷⁸ in which police officers sought Rice on a warrant for receiving stolen property. When the police executed a search warrant, they found none of the listed stolen property, but they did find one different item they later learned had been reported stolen.¹⁷⁹ When an officer arrested Rice for possessing that stolen item, he found drugs in her purse.¹⁸⁰ She sought to suppress the evidence, arguing that there had been no probable cause to arrest her. The court of appeals agreed that there was no probable cause for the arrest because nothing connected Rice to the stolen item seen at the house she rented.¹⁸¹ The court then considered whether the drugs found in her purse—otherwise excluded—were admissible under the good faith exception to the exclusionary rule.¹⁸² Ultimately, the court concluded that although the arresting officer acted in good faith, the officer who obtained the arrest warrant failed to demonstrate in his affidavit any connection between the allegedly stolen item and Rice.¹⁸³ Thus, the affidavit was facially deficient and could not serve as the good faith basis for an arrest.¹⁸⁴ The court of appeals

169. 916 N.E.2d 230 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 783 (Ind. 2010).

170. *Id.* at 233-34.

171. *Id.* at 234.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 241. The court of appeals also found the search valid under the Fourth Amendment. *Id.* at 240.

177. *Id.*

178. 916 N.E.2d 296 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 792 (Ind. 2010).

179. *Id.* at 298.

180. *Id.* at 299.

181. *Id.* at 304.

182. *Id.*

183. *Id.*

184. *Id.* at 304-06.

therefore declined to apply the good faith exception and excluded the evidence of drugs.¹⁸⁵

*Harper v. State*¹⁸⁶ addressed a search incident to a traffic stop. Before officers could stop the car they were following, the car pulled up to a motel, and Harper and a companion left the car and walked toward a motel room.¹⁸⁷ Officers asked for permission to search a bag Harper was carrying. Harper gave permission, and the officers found drugs inside the bag.¹⁸⁸ The court of appeals found the officers' conduct unreasonable under the Indiana Constitution.¹⁸⁹ The officers had a reason to stop the car (a burned-out license plate light), but Harper and his companion were cooperative and provided no justification for officers to be suspicious or search them.¹⁹⁰ Because Harper consented to the search, however, he waived any objection to its constitutionality.¹⁹¹

Search and seizure involving a juvenile was the subject of *W.H. v. State*.¹⁹² The juvenile was standing on a street corner in downtown Indianapolis with companions during a high-traffic period—the Indiana Black Expo.¹⁹³ Uniformed officers stationed where they could observe the crowd saw W.H. reveal what they believed to be a gun in his waistband.¹⁹⁴ Other officers approached W.H. to try to remove him from the crowd for questioning, and when he tried to resist, they physically apprehended him and found a gun in his waistband.¹⁹⁵ Balancing the *Litchfield* factors, the court of appeals found the seizure of W.H. to be reasonable.¹⁹⁶ Specifically, W.H. was in a crowd at a densely populated convention in the heat of the summer.¹⁹⁷ The officers had a legitimate concern that he was carrying a firearm, and he resisted when they tried to separate him from the crowd.¹⁹⁸ Finally, the stop was brief and unintrusive until W.H. tried to resist, and law enforcement's need to maintain a safe environment was very strong.¹⁹⁹

*Chest v. State*²⁰⁰ involved a defendant who refused to provide identification

185. *Id.* at 305-06.

186. 922 N.E.2d 75 (Ind. Ct. App.), *trans. denied sub nom.* *Porch v. State*, 929 N.E.2d 796 (Ind. 2010).

187. *Id.* at 77-78.

188. *Id.* at 78.

189. *Id.* at 81.

190. *Id.*

191. *Id.* at 81-82.

192. 928 N.E.2d 288 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 826 (Ind. 2010).

193. *Id.* at 290.

194. *Id.*

195. *Id.* at 290-91.

196. *Id.* at 296-97. The court of appeals also found that the search did not violate the Fourth Amendment. *Id.* at 294-96.

197. *Id.* at 297.

198. *Id.*

199. *Id.*

200. 922 N.E.2d 621 (Ind. Ct. App. 2009).

when he was pulled over for a traffic violation.²⁰¹ He was arrested, and officers then searched his car to look for identification.²⁰² They found his wallet “next to a loaded handgun,” and he was convicted of several charges including illegal possession of a handgun.²⁰³ His sole claim on appeal was that the search violated the Indiana Constitution, and the court of appeals agreed.²⁰⁴ Although Chest had committed a crime, there was no reason for police to believe that evidence of that crime was in his car, so they lacked a reason to search.²⁰⁵ The degree of intrusion involved in the search was low, and the lack of law enforcement need was even lower; thus, on balance, the search was not reasonable.²⁰⁶ The court therefore reversed the handgun conviction and remanded “with instructions for the trial court to vacate the conviction and sentence.”²⁰⁷

The defendant in *Trotter v. State*²⁰⁸ claimed that evidence gathered in a “warrantless entry into a private residence” should be suppressed.²⁰⁹ In this case, a police officer responded to a complaint of shots being fired near a residential neighborhood and found a man sitting by a campfire outside a home with weapons visible.²¹⁰ The man reported that his companion was inside a nearby home using the bathroom.²¹¹ Police entered the building without knocking and encountered Trotter pointing a rifle at them.²¹² He was subdued by a SWAT team and charged with firearm-related felonies.²¹³ Trotter moved to suppress the weapons found in the search, arguing that there was no probable cause for police to enter the building without a warrant. The court of appeals found the search unreasonable under the Indiana Constitution.²¹⁴ Balancing the *Litchfield* factors, the court of appeals found that the police had no reason to believe any law had been violated, and the degree of intrusiveness of the search was “immense” because it involved entering a structure connected to a private residence.²¹⁵ Moreover, law enforcement need was low because there was no reason to believe a crime had been committed or anyone was in danger.²¹⁶

On an issue of first impression, the court of appeals also rejected the State’s

201. *Id.* at 622-23.

202. *Id.* at 623.

203. *Id.*

204. *Id.* at 626.

205. *Id.* at 624-25.

206. *Id.* at 624-26.

207. *Id.* at 626.

208. 933 N.E.2d 572 (Ind. Ct. App. 2010).

209. *Id.* at 576-77.

210. *Id.* at 577.

211. *Id.*

212. *Id.* at 577-78.

213. *Id.* at 578.

214. *Id.* at 580-81. The court also invalidated the search under the Fourth Amendment. *Id.* at 579-81.

215. *Id.* at 580-81.

216. *Id.*

argument that the doctrine of attenuation should have allowed the evidence to be admitted because Trotter's act of pointing a firearm "dissipated any taint of the unconstitutional entry."²¹⁷ The doctrine of attenuation is federal in origin, and the court of appeals ruled in *Trotter* that "the attenuation doctrine has no application under the Indiana Constitution."²¹⁸ The purpose of the attenuation doctrine is to allow evidence to be admitted when illegal police conduct is so attenuated from subsequent discovery of incriminating evidence that the deterrent purposes of the exclusionary rule would not be served.²¹⁹ The court concluded that the doctrine should not apply in Indiana constitutional analysis because of Indiana's unique commitment to individual rights and because the *Litchfield* analysis focuses on the totality of circumstances to determine whether law enforcement conduct was reasonable.²²⁰ The court of appeals ruled that the evidence should be suppressed.²²¹

*Wilkerson v. State*²²² concerned the application of Indiana's unique *Pirtle* rule requiring advisement that an individual in custody has a right to consult with counsel before consenting to a search.²²³ Police stopped Wilkerson to speak to him about his window tint—which they deemed too dark—after they had been warned that he was suspected of transporting drugs.²²⁴ Wilkerson agreed to be patted down for weapons, and during that action, police felt a baggy in his crotch, which later was found to contain drugs.²²⁵ The court of appeals rejected Wilkerson's argument that because his windows were not so dark as to prevent individuals from being identified within the car, there was no probable cause for the stop.²²⁶ The court of appeals also ruled as a matter of first impression that *Pirtle* did not apply to pat-downs of the sort conducted on Wilkerson because the pat-down took little time, was narrow in scope, and was non-invasive.²²⁷

J. Sentencing

Finally, Indiana's appellate courts continued during the survey period to review and occasionally revise criminal sentences using their power under article 7, sections 4 and 6. The most noteworthy case in this category this year was the first case in which an appellate court increased a criminal sentence of which a

217. *Id.* at 581.

218. *Id.* at 583.

219. *Id.* at 581 (quoting *Brown v. Illinois*, 422 U.S. 590, 609 (1975) (Powell, J., concurring)). Indiana applied its own version of the exclusionary rule decades before it was enforced as a matter of federal constitutional law. *Callender v. State*, 138 N.E. 817, 818-19 (1923).

220. *Trotter*, 933 N.E.2d at 582.

221. *Id.* at 584.

222. 933 N.E.2d 891 (Ind. Ct. App. 2010).

223. *See generally* *Pirtle v. State*, 323 N.E.2d 634 (Ind. 1975).

224. *Wilkerson*, 933 N.E.2d at 892-93.

225. *Id.* at 893.

226. *Id.*

227. *Id.* at 894.

defendant had sought review, a possibility the Indiana Supreme Court introduced in *McCullough v. State*²²⁸ in 2009. The court of appeals increased a criminal sentence on appeal, but the Indiana Supreme Court vacated the decision on transfer and declined to increase the sentence in its own decision.²²⁹ Professor Schumm fully addresses these Indiana cases in his article on developments in criminal procedure.²³⁰

228. 900 N.E.2d 745, 749-50 (Ind. 2009).

229. *Akard v. State*, 924 N.E.2d 202 (Ind. Ct. App.), *reh'g granted for limited purpose of clarification*, 928 N.E.2d 623 (Ind. Ct. App.), *vacated*, 940 N.E.2d 823 (Ind.) (table), *opinion on transfer*, 937 N.E.2d 811 (Ind. 2010).

230. Joel Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 44 IND. L. REV. 1135 (2011).

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

JOEL M. SCHUMM*

The legislature and Indiana's appellate courts confronted a variety of significant issues during the survey period from October 1, 2009, to September 30, 2010. The Indiana General Assembly ("General Assembly") created a new procedure to address the removal of defendants from the sex offender registry but was fairly restrained in creating new crimes and altering penalties for existing crimes. The Indiana Supreme Court and Indiana Court of Appeals addressed issues ranging from the traditional fare of sentencing, sufficiency of the evidence, and probation to a variety of more novel issues, including enhancements of school-zone drug convictions, inconsistent jury verdicts, reversal of convictions for judicial misconduct and overreaching, and sorting through the aftermath of the landmark *Wallace* opinion¹ limiting sex offender registration.

I. LEGISLATIVE DEVELOPMENTS

The General Assembly's 2010 short session created new crimes and enhanced penalties for existing crimes. Although it was previously a Class C felony to traffic in a cellular phone with an inmate,² a new statute now also criminalizes the possession of a cellular phone by a person incarcerated in a county jail as a Class A misdemeanor.³ The involuntary manslaughter statute was expanded to include defendants who cause the death of a fetus while operating while intoxicated.⁴ The operating while intoxicated statute was amended to create a D felony offense if the conduct results in the death of a law enforcement animal.⁵ A person who resists law enforcement while operating a motor vehicle in a manner that causes the death of a law enforcement officer commits a Class A felony.⁶

Considerable media attention, though, was generated by one of the least severe offenses: the Class B misdemeanor offense of failing to require proof of age before selling alcohol for carry-out.⁷ Checking identification has long been routine for those who appear to be near the required minimum age of twenty-one,

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1. *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009).

2. IND. CODE § 35-44-3-9(d) (2011).

3. *Id.* § 35-44-3-9.6.

4. *Id.* § 35-42-1-4(d).

5. *Id.* § 9-30-5-5. The legislation was proposed by representatives from St. Joseph County in response to the killing of Mishawaka police officer James Szuba and K9 "Ricky" on January 9, 2010. A YouTube video offers a tribute to both. Time Capsule DVP, *Mishawaka Police Cpl. James Szuba and K9 Ricky Funeral*, YOUTUBE (Jan. 21, 2010), <http://www.youtube.com/watch?v=TTNl5VsVFXo>.

6. IND. CODE § 35-44-3-3 (Version b).

7. *Id.* § 7.1-5-10-23; see, e.g., Richard Gootee, *My ID . . . Really?*, INDIANAPOLIS STAR, July 2, 2010, at A1.

but the new statute requires that employees check identification of all who seek to purchase alcohol, even those decades past the legal drinking age.⁸ The statute includes a defense for those selling to someone who “was or reasonably appeared to be more than fifty (50) years of age.”⁹

Most new misdemeanor offenses, though, generated little media attention and likely remain a mystery to the vast majority of citizens. For example, commercial vehicle operators who provide for intrastate transport of metal coils now commit an A misdemeanor conviction if the operator has not been certified in proper load securement.¹⁰

Finally, the General Assembly created a fourteen-member criminal law and sentencing policy study committee to evaluate criminal and sentencing laws and make recommendations to the General Assembly for changes that relate to the purpose of the criminal justice system, the availability of sentencing options, and the inmate population at the department of correction.¹¹ If the committee is able to make recommendations that muster legislative support, next year’s survey may include more sweeping revisions to the criminal code.

II. SIGNIFICANT CASES

The Indiana Supreme Court and Indiana Court of Appeals addressed a wide range of issues that impact criminal cases from their inception to their conclusion.

A. *Excessive Bail Reduced*

Two years ago, this survey discussed a rare (and successful) challenge to pretrial bail.¹² In *Samm v. State*,¹³ the court of appeals held that the trial court abused its discretion by “failing to acknowledge uncontroverted evidence on several” statutory bail factors.¹⁴ The case was unusual in part because bail challenges seldom make it to the appellate courts; the appellate process generally takes several months, often rendering such challenges moot.¹⁵

During this survey period, a defendant charged with ten counts of securities fraud challenged his \$1.5 million bail as excessive in *Reeves v. State*.¹⁶ The court of appeals denied his motion for expedited preparation of the record and expedited the briefing schedule only by prohibiting extensions beyond the normal deadlines.¹⁷ Briefing was completed in about three months, and the opinion was

8. IND. CODE § 7.1-5-10-23.

9. *Id.*

10. IND. CODE § 9-21-8-58.

11. *Id.* § 2-5.5-5-2, -13.

12. See Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 42 IND. L. REV. 937, 953-55 (2009).

13. 893 N.E.2d 761 (Ind. Ct. App. 2008).

14. *Id.* at 768.

15. Schumm, *supra* note 12, at 954.

16. 923 N.E.2d 418, 420 (Ind. Ct. App. 2010), *trans denied*, 928 N.E.2d 10 (Ind. 2011).

17. The clerk’s online docket may be accessed at hats.courts.state.in.us/ISC3RUS/ISC2menu.

issued about six weeks later.¹⁸ Reiterating that the fundamental purpose of bail is to ensure a defendant's presence in court, the court of appeals reversed, faulting the trial court for making no attempt to apply the statutory factors when determining the bail amount.¹⁹ Rather than reducing the bail, the court remanded for the trial court to set bail "in an amount that takes into account the statutory factors" and "explain its rationale for the bail imposed in relation to those standards."²⁰

Although the exorbitant \$1.5 million bail in *Reeves* seems especially easy to challenge on appeal, bail of much smaller amounts may have the same effect of keeping a defendant in jail—often for several months or longer while awaiting trial. Whether defense counsel will exercise the right to appeal bail more frequently may depend at least in part on whether the court of appeals will allow for more meaningful (expedited) review of those decisions.

B. Reversals for Judicial Misconduct

The Indiana Supreme Court ordered new trials in two cases—an A felony child molesting case and a misdemeanor driving while suspended case—based on misconduct by the trial judge. The court applied somewhat different standards, which could lead to confusion in the future.

In *Everling v. State*,²¹ the supreme court reversed several convictions for child molesting and sexual misconduct with a minor because the cumulative result of the trial court's "comments, exclusions [of evidence], and general demeanor toward the defense was a trial below the standard towards which Indiana strives."²² The court reiterated that judges are presumed "unbiased and unprejudiced" and that appellate courts generally require defendants to "establish from the judge's conduct actual bias or prejudice that places the defendant in jeopardy"²³—a standard not applied in the misdemeanor driving case.

The reach of *Everling* is likely limited, though, because it is grounded in the cumulative effect of the rulings and comments.²⁴ Nevertheless, the individual components warrant consideration because they could resurface in future cases. The supreme court categorized the trial court's assessment of partiality as "comments to counsel, comments in front of the jury, uneven tolerance of late

jsp (search for case no. 77A01-0909-CR-00446).

18. *Id.*

19. *Reeves*, 923 N.E.2d at 422.

20. *Id.* This approach differs from appellate sentence review, for example, where the appellate courts routinely lower sentences to a specific term rather than giving the trial court a do-over, which could presumably lead to another appeal if not done correctly. *See, e.g.*, Schumm, *supra* note 12, at 948-51.

21. 929 N.E.2d 1281 (Ind. 2010).

22. *Id.* at 1291.

23. *Id.* at 1287.

24. *See, e.g., id.* at 1290 (remarking that the cumulative effect could not be ignored "simply because each of them would otherwise not suffice to reverse").

filings, and erroneous rulings.”²⁵ Although appellate scrutiny generally focuses on comments that could influence a jury,²⁶ the supreme court gave weight to the trial court’s comments outside the presence of the jury, including a comment that defense counsel had done “unethical things” in court.²⁷ In remarking on the comments in front of the jury, the court focused not on legal questions, “but the general demeanor taken with defense counsel. These comments were adversarial if not condescending, and they certainly communicated to the jury that . . . [counsel] was a less than competent attorney.”²⁸ The court also found improper the trial court’s assisting of the prosecution “in making and responding to objections” based on “context and one-sidedness.”²⁹ Although addressed as part of the broad claim of partiality,³⁰ the exclusion of a late-disclosed expert witness may present an independent basis for reversal when the testimony was critical to the defense, the late disclosure was explained by defense counsel’s illness, and a continuance could easily have been granted.³¹

In a misdemeanor case decided just weeks before *Everling*, the court focused largely on violations of ethical rules. In *Hollinsworth v. State*,³² a young woman charged with driving with a suspended license informed the trial court that she would like to accept the State’s plea agreement early in her trial.³³ The trial court “exhibited impatience and stated that if . . . [she] were found guilty, ‘she’s going to jail for a year.’”³⁴ The court continued, “I don’t know if I want to take your plea. I’d rather just go to trial, I think. I don’t like being jerked around at all, all right?”³⁵ A trial ensued, and the trial court imposed a one-year jail sentence, which was later reduced.³⁶ During sentencing, the court noted that Hollinsworth had been charged with theft and battery and responded, “Sure they are,” when defense counsel stated, “Those are only alleged charges.”³⁷

The Indiana Supreme Court reversed the conviction and ordered a new trial.³⁸ The short per curiam opinion relied heavily on Judicial Conduct Canon 2, which requires judges to “perform the duties of judicial office impartially, competently,

25. *Id.* at 1289.

26. *Id.* at 1288 (quoting *Kennedy v. State*, 280 N.E.2d 611, 620-21 (Ind. 1972) (noting that jurors’ respect for trial courts “can lead them to accord great and perhaps decisive significance to the judge’s every word and intimation”)).

27. *Id.* at 1290.

28. *Id.*

29. *Id.*

30. *Id.* at 1291.

31. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 41 IND. L. REV. 955, 984-86 (2008).

32. 928 N.E.2d 201 (Ind. 2010).

33. *Id.* at 201.

34. *Id.* (citation omitted).

35. *Id.* (citation omitted).

36. *Id.*

37. *Id.* at 202 (citation omitted).

38. *Id.*

and diligently.”³⁹ Judges must (1) be “objective and open-minded” under Rule 2.2, comment 1; (2) perform duties “without bias or prejudice” under Rule 2.3(A); (3) be “patient, dignified, and courteous to litigants” under Rule 2.8(B); and (4) disqualify themselves in any proceeding where their impartiality “might reasonably be questioned” under Rule 2.11(A).⁴⁰ The supreme court concluded that Marion County Superior Court Judge William Young’s “behavior in this cases did not meet these standards.”⁴¹ The court did not engage in harmless error analysis or suggest that numerous or particularly egregious violations must occur to warrant a new trial;⁴² therefore, this case will likely be cited in the future by both criminal and civil litigants who seek a new trial based on judicial misconduct. Read with *Everling*, though, reversal may not be required unless there are numerous or particularly egregious violations of the canons.

Beyond the possible reversal of a case, judges who engage in misconduct may also face disciplinary sanctions. A few weeks after the *Hollinsworth* opinion was issued, the Indiana Commission on Judicial Qualifications filed four counts of misconduct against Judge Young, focusing on his actions in that case and the general practice of “imposing substantially higher penalties against traffic court litigants who chose to have trials and lost” and “routinely ma[king] statements implying that litigants should not demand trials and would be penalized for doing so if they lost.”⁴³

Finally, if a judge manages to upset a wide swath of the public, the General Assembly may get involved. In response to Judge Young’s traffic court antics,⁴⁴ the General Assembly significantly amended the penalties for infractions. Instead of the longstanding maximum \$500 fine for any Class C infraction, a person who admits a violation before court or admits the violation on the day of court cannot be fined more than \$35.50.⁴⁵ A person who contests the violation cannot be fined more than \$35.50 either, if facing his or her first moving violation in the county within five years.⁴⁶ Maximum fines increase to \$250 or \$500, however, if a person has one or two prior violations in that same county.⁴⁷

39. *Id.*

40. *Id.* (internal citations omitted).

41. *Id.*

42. *See id.*

43. Notice of the Institution of Formal Proceedings and Statement of Charges at 3-4, *In re* Hon. William E. Young, No. 49500-1007-JD-374 (Ind. July 16, 2010); *see also* Press Release, Indiana Courts, Judicial Qualifications Commission Files Misconduct Charges Against Marion Superior Court Judge (July 16, 2010), *available at* <http://www.in.gov/judiciary/press/2010/0716.html>.

44. *See* Jon Murray, *Law Caps Fines for Traffic Court*, INDIANAPOLIS STAR, Mar. 25, 2010, at A21.

45. IND. CODE § 34-28-5-4 (2011).

46. *Id.*

47. *Id.*

C. Prosecutors Pushing the Envelope

Trial courts have considerable discretion to regulate what lawyers argue throughout a case—from voir dire to closing arguments. Two cases from the survey period demonstrate that this discretion is wide but not without limit.

Prosecutors are free to ask questions during voir dire “designed to disclose the jurors’ attitudes towards the offense charged and to uncover preconceived ideas about defenses the defendant intends to use.”⁴⁸ Although defendants should request an admonishment or move for a mistrial if the prosecutor crosses the line, the court of appeals may nevertheless consider the issue as fundamental error in the absence of such a request.⁴⁹ In *Adcock v. State*, the court of appeals considered the prosecutor’s analogy of “‘reasonable doubt being like a jigsaw puzzle with pieces missing’ during voir dire.”⁵⁰ Although other jurisdictions have sometimes found similar references improper,⁵¹ courts have generally affirmed convictions if the jury was instructed about the proper definition of reasonable doubt.⁵² In *Adcock*, the court of appeals relied on the jury instructions, the prosecutor’s statements and questions “as a whole,” and the defendant’s opportunity to rebut the prosecutor’s comments in finding no fundamental error.⁵³

In *Miller v. State*,⁵⁴ a divided panel reversed a conviction for armed robbery based on the prosecutor’s showing of a YouTube video during closing argument.⁵⁵ The video, which was created in a completely unrelated context for school administrators, showed a person who was able to conceal several guns under his clothing.⁵⁶ The defense at trial was mistaken identity and that the robber had used a shotgun. The prosecutor acknowledged when showing the video that it “has nothing to do with the case” and that “[i]n no way, shape, or form, are we saying that Terrence Miller had a pistol.”⁵⁷ Nevertheless, the court of appeals reversed.⁵⁸ In the lead opinion for the court, Judge May agreed with the defendant that the video “had the effect of bringing alive the passions of the jury . . . and suggested Miller was not only the robber but that he also had multiple firearms on his person and intended to use them to cause injury or death.”⁵⁹ Judge Barnes wrote a separate concurring opinion, finding the video was “the proverbial evidentiary harpoon that skewed the ability of the jury to

48. *Adcock v. State*, 933 N.E.2d 21, 26 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 827 (Ind. 2010).

49. *Id.*

50. *Id.* (citation omitted).

51. *Id.* at 27 (citing *People v. Katzenberger*, 101 Cal. Rptr. 3d 122, 125 (Ct. App. 2009)).

52. *Id.* at 27-28.

53. *Id.* at 28.

54. 916 N.E.2d 193 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 782 (Ind. 2010).

55. *Id.* at 199.

56. *Id.* at 195.

57. *Id.* at 196 (citation omitted).

58. *Id.* at 199.

59. *Id.* at 197 (quoting the appellant’s reply brief).

fairly and impartially decide the case.”⁶⁰ Finally, Chief Judge Baker dissented, concluding that showing the video was error but not reversible because the video was irrelevant to Miller’s mistaken identity defense.⁶¹

D. “Operating” Vehicles While Intoxicated—and the Newfound Importance of “Endangerment”

Although sufficiency of the evidence claims are often viewed as a hopeless cause, defendants convicted of operating a vehicle while intoxicated have prevailed in several cases over the years.⁶² This survey period added a few more.

1. *Endangerment*.—In *Outlaw v. State*,⁶³ the Indiana Supreme Court adopted the appellate court’s opinion in concluding that operating a vehicle while intoxicated “in a manner that endangers a person,” a Class A misdemeanor under Indiana Code section 9-30-5-2(b), requires proof beyond mere evidence of intoxication.⁶⁴ The State conceded that Outlaw had not operated his vehicle in an unsafe manner; therefore, only the C misdemeanor offense of operating a vehicle was intoxicated was proven.⁶⁵

Applying *Outlaw*, the court of appeals also found insufficient evidence of endangerment in *Temperly v. State*,⁶⁶ a case where the defendant was involved in an accident after another driver drove his vehicle into the defendant’s path.⁶⁷ No evidence other than the defendant’s intoxication was offered to support endangerment of the defendant or any other person.⁶⁸ Similarly, *Dorsett v. State*⁶⁹ failed for sufficient evidence of endangerment when the defendant was found intoxicated in his parked vehicle.⁷⁰ However, in *Vanderlinden v. State*,⁷¹ decided the same day as *Outlaw*, the court of appeals concluded that excessive speed (fifty-one in a thirty-five mile per hour zone) was sufficient to prove

60. *Id.* at 199 (Barnes, J., concurring).

61. *Id.* (Baker, C.J., dissenting). Transfer was denied in *Miller* by a 3-2 vote with Chief Justice Shepard and Justice Dickson voting to grant transfer. *Miller v. State*, No. 09A02-0812-CR-1133, 2010 Ind. LEXIS 46 (Ind. Jan. 10, 2010). Regardless of agreement with the outcome of a court of appeals case, the supreme court frequently grants transfer when the court of appeals issues a published decision that includes separate opinions from all three judges. *See, e.g., Lewis v. State*, 931 N.E.2d 875 (Ind. Ct. App. 2010), *vacated on transfer*, 949 N.E.2d 1243 (Ind. 2011).

62. *See, e.g., Flanagan v. State*, 832 N.E.2d 1139 (Ind. Ct. App. 2005); *Nichols v. State*, 783 N.E.2d 1210 (Ind. Ct. App. 2003); *Clark v. State*, 611 N.E.2d 181 (Ind. Ct. App. 1993); *Hiegel v. State*, 538 N.E.2d 265 (Ind. Ct. App. 1989).

63. 929 N.E.2d 196 (Ind. 2010).

64. *Id.* at 196.

65. *Id.*

66. 933 N.E.2d 558 (Ind. Ct. App. 2010), *trans. denied*.

67. *Id.* at 568.

68. *Id.*

69. 921 N.E.2d 529 (Ind. Ct. App. 2010).

70. *Id.* at 533.

71. 918 N.E.2d 642 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 787 (Ind. 2010).

endangerment.⁷² Beyond those facts, however, the court expressly “decline[d] to determine the precise extent of speeding, in the absence of other factors, necessary to show endangerment.”⁷³

2. “*Operating.*”—In *Gatewood v. State*,⁷⁴ a man on a moped stumbled into the emergency room of a hospital at 8:00 p.m. He was found an hour later asleep by his moped with a blood-alcohol content of 0.286.⁷⁵ The defendant testified that he drank a pint of vodka after arriving at the hospital, but no vodka bottle was found. The court rejected the State’s argument that the defendant’s intoxication at 9:00 p.m. allowed the jury to reasonably infer he was intoxicated when he drove his moped at an hour earlier, stating, “Even if we assume that Gatewood drank some alcohol before arriving at the hospital, the State simply presented no evidence that when Gatewood operated his moped around 8:00 p.m., he had an impaired condition of thought and action and the loss of normal control of a person’s faculties.”⁷⁶

Other defendants challenging their “operation” of a vehicle were not successful. In *Dorsett v. State*,⁷⁷ the Indiana Court of Appeals found sufficient circumstantial evidence that the defendant had driven his vehicle found in a parking lot.⁷⁸ The defendant told police that he drove to a McDonald’s after becoming intoxicated at a friend’s party.⁷⁹ Based on the time-stamp on a receipt, the court found it reasonable to infer that he had purchased food in the drive-through before parking in the lot where he was found slumped over in his vehicle, which was running.⁸⁰ Moreover, in *Crawley v. State*,⁸¹ a defendant challenged her conviction for operating a vehicle while her license was forfeited for life on the basis that no one observed her operating a vehicle, which was found backed into a swimming pool.⁸² Applying the same factors used in operating while intoxicated cases, the court of appeals found sufficient evidence of operating when the defendant “possessed the car, was present at the scene, was highly impaired, made statements to . . . [the pool owner] that no one was with her, and made efforts to avoid the police being summoned”⁸³ Judge Riley dissented, concluding that the evidence created “a probability” of operating but not proof beyond a reasonable doubt and that the evidence presented was similar to other cases the court had reversed for insufficient evidence.⁸⁴

72. *Id.* at 646.

73. *Id.* at 646 n.1.

74. 921 N.E.2d 45 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 792 (Ind. 2010).

75. *Id.* at 47.

76. *Id.* at 50.

77. 921 N.E.2d 529 (Ind. Ct. App. 2010).

78. *Id.* at 532.

79. *Id.* at 531.

80. *Id.* at 531-32.

81. 920 N.E.2d 808 (Ind. Ct. App. 2010).

82. *Id.* at 809.

83. *Id.* at 813.

84. *Id.* at 814 (Riley, J., dissenting).

E. Strict Construction of Statutes and Drug Offenses in Particular

A number of cases highlighted the strict construction of penal statutes in a manner that allows some defendants to escape criminal liability.⁸⁵ In *State v. Prater*,⁸⁶ the court of appeals considered the scope of the intent requirement for manufacturing methamphetamine under Indiana Code section 35-48-4-14.5.⁸⁷ Subsection (c) of that statute criminalizes as a D felony the possession of “anhydrous ammonia with intent to manufacture methamphetamine.”⁸⁸ The majority in *Prater* held that the statute does not criminalize the mere possession of anhydrous ammonia; rather, the person in possession must also personally have the intent to use the ammonia to manufacture methamphetamine.⁸⁹ “Otherwise, countless individuals who possess or sell anhydrous ammonia for lawful purposes could be charged with illegal possession, which would yield an absurd result.”⁹⁰ Judge Bradford dissented, noting that manufacturing meth “is a multi-step, multi-ingredient process, often involving multiple parties.”⁹¹ He wrote that the person who secures the ammonia should not be immunized from criminal liability simply by not involving himself personally in the manufacturing process.⁹²

In *Lovitt v. State*,⁹³ the court of appeals shut down the State’s attempt to broaden the maintaining a common nuisance statute to include mere drug possession in a vehicle.⁹⁴ A person maintains a common nuisance by unlawfully “keeping” a controlled substance; the offense is a class D felony.⁹⁵ Although the defendant had marijuana in his pocket while operating a vehicle, the term “keeping” in the statutory context applies only when the substance is “contained within the vehicle itself or that the vehicle is used to store the controlled substance for further manufacturing, sale, delivery or financing the delivery of that or another controlled substance.”⁹⁶ The court concluded that the General Assembly would not have intended the broad interpretation, which would “make every drug arrest after a traffic stop subject to an additional charge of maintaining a common nuisance.”⁹⁷ In another case focused on the “maintaining” language of the common nuisance statute, the court of appeals found insufficient evidence

85. See generally Schumm, *supra* note 31, at 981-83 (summarizing developments under the heading “Creepy Not Criminal: The Primacy of Language in Criminal Statutes”) (internal citation omitted).

86. 922 N.E.2d 746 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 797 (Ind. 2010).

87. *Id.* at 747.

88. *Id.* at 749 (quoting IND. CODE § 35-48-4-14.5(c) (2010)).

89. *Id.* at 749-50.

90. *Id.* at 750.

91. *Id.* (Bradford, J., dissenting).

92. *Id.*

93. 915 N.E.2d 1040 (Ind. Ct. App. 2009).

94. *Id.* at 1045.

95. *Id.* at 1044 (citing IND. CODE § 35-48-4-13(b) (2010)).

96. *Id.* at 1045.

97. *Id.*

when a defendant was part of methamphetamine manufacturing operating in the yard of another person's residence because there was no evidence the defendant "had any control over the premises."⁹⁸

*Hyche v. State*⁹⁹ is another drug possession case aggressively charged into something more severe. There, the court of appeals vacated convictions for felony murder and dealing a controlled substance.¹⁰⁰ Felony murder requires the killing of another person while committing a delineated felony, including dealing a controlled substance.¹⁰¹ Dealing can occur in a number of ways, including the delivery or financing of the delivery of a controlled substance.¹⁰² Because Hyche merely attempted to purchase drugs, "delivery" did not apply.¹⁰³ That Hyche "called another person to request drugs no more makes him a dealer in ecstasy than it would make a customer who calls the florist a dealer in flowers."¹⁰⁴ Nor did he "finance" the delivery of drugs by agreeing to pay \$30 for them when he "acted merely as a purchaser and not as a creditor or an investor."¹⁰⁵ Finally, the court of appeals rejected the State's argument that Hyche was an accomplice in dealing drugs. Although he was present at the scene of the crime with the dealer, the two were not companions.¹⁰⁶ That factor distinguishes the case from those where defendants were active in brokering drug deals and "acting on the distribution side of the transactions."¹⁰⁷

Finally, reckless possession of paraphernalia¹⁰⁸ remains a nearly impossible crime for the State to prove, although some prosecutors continue to file the charge. For several years, the court of appeals has remarked that "a showing of recklessness is impossible without a showing of possible harm," and "it is difficult to imagine a set of facts that would satisfy the elements" of the offense.¹⁰⁹ In the most recent example, an officer discovered a crack pipe behind the driver's door handle.¹¹⁰ Because the State could not show any possible harm from that possession of the crack pipe, the court held that the trial court should have dismissed the charge.¹¹¹

98. *Gaynor v. State*, 914 N.E.2d 815, 816 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009).

99. 934 N.E.2d 1176 (Ind. Ct. App. 2010), *trans. denied*.

100. *Id.* at 1180.

101. *Id.* at 1178 (citing IND. CODE § 35-42-1-1(3)(C) (2010)).

102. *Id.* (citing IND. CODE § 35-48-4-2(a)).

103. *Id.* at 1179.

104. *Id.*

105. *Id.* at 1180.

106. *Id.*

107. *Id.*

108. IND. CODE § 35-48-4-8.3(c) (2011).

109. *Helms v. State*, 926 N.E.2d 511, 515 (Ind. Ct. App. 2010) (quoting *Castner v. State*, 840 N.E.2d 362, 366-67 (Ind. Ct. App. 2006)).

110. *Id.*

111. *Id.*

F. Receiving Stolen Property Requires More Than Mere Possession

In *Fortson v. State*,¹¹² the Indiana Supreme Court clarified the proof necessary for a conviction for receiving stolen property.¹¹³ Before 1970, Indiana courts could consider the unexplained possession of recently stolen property as a circumstance from which the factfinder could draw an inference of guilt.¹¹⁴ Beginning in 1970, though, the rule changed, and convictions based on the unexplained possession of recently stolen property standing alone were upheld.¹¹⁵ In *Fortson*, the supreme court returned to the pre-1970 approach, holding that

mere unexplained possession of recently stolen property standing alone does not automatically support a conviction for theft. Rather, such possession is to be considered along with the other evidence in a case, such as how recent or distant in time was the possession from the moment the item was stolen, and what are the circumstances of the possession (say, possessing right next door as opposed to many miles away). In essence, the fact of possession and all the surrounding evidence about the possession must be assessed to determine whether any rational juror could find the defendant guilty beyond a reasonable doubt.¹¹⁶

Applying the rule to the facts in *Fortson*, the court found insufficient evidence to support the conviction because there was no evidence that the defendant attempted to conceal a stolen truck from police officer, nor did he physically resist the officers, flee, or provide evasive answers.¹¹⁷ Finally, the court endorsed a jury instruction from Montana and encouraged its use in future cases.¹¹⁸

G. Sufficiency for Other Crimes

The court of appeals addressed the sufficiency of evidence in other contexts, including the frequently litigated realm of resisting law enforcement and the more novel context of parental discipline and jail sex.

1. *Resisting Law Enforcement*.—As summarized in last year's survey,¹¹⁹ resisting law enforcement requires proof that a defendant "forcibly" resisted,¹²⁰ and several cases have reversed convictions because the defendant's resistance was passive or otherwise did not involve force directed to the officer.¹²¹ Building

112. 919 N.E.2d 1136 (Ind. 2010).

113. *Id.* at 1139; IND. CODE § 35-43-4-2(b).

114. *Id.* at 1141.

115. *Id.* at 1142 (citing *Bolton v. State*, 261 N.E.2d 841, 843 (Ind. 1970)).

116. *Id.* at 1143.

117. *Id.* at 1144.

118. *Id.* at 1143 n.5.

119. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 43 IND. L. REV. 691, 698-700 (2010).

120. IND. CODE § 35-44-3-3(a)(1) (2011).

121. See, e.g., *Spangler v. State*, 607 N.E.2d 720 (Ind. 1993); *Ajabu v. State*, 704 N.E.2d 494,

on last year's supreme court opinion in *Graham v. State*,¹²² the court of appeals in *Colvin v. State*¹²³ found insufficient evidence of forcible resistance when a defendant was "not obeying . . . [officers'] commands" and one officer "had to forcibly take control of the defendant."¹²⁴ The defendant "kept his hands in his pockets during the struggle," and his failure to comply with commands or requiring officers to use force in effectuating an arrest were held insufficient to support the conviction.¹²⁵

Relying on *Colvin*, the court of appeals found insufficient evidence of forcible resistance in *A.C. v. State*.¹²⁶ There, the juvenile respondent did not stand up when asked, leaned away when the officer pulled up his pants, and presented no struggle when the officer handcuffed him.¹²⁷ Even the leaning away from the officer was found insufficient because the officer did not have "to struggle or get physical" with the respondent.¹²⁸ The court of appeals aptly concluded that although A.C.'s conduct "may have justified a physical response from the officer, that does not equate to criminal conduct" under the supreme court's resisting jurisprudence.¹²⁹ The defendant must use force; actions that lead an officer to use force will often not lead to criminal liability.

2. *Failing to Intervene in Parental Discipline*.—In *Lay v. State*,¹³⁰ the court of appeals upheld a conviction for neglect of a dependent resulting in serious bodily injury against a father who had taken no part in disciplining his daughter.¹³¹ The child's mother admitted to causing severe injuries and extensive bruising to her three-year-old daughter.¹³² The father heard the spanking while he was playing video games in another room.¹³³ The court reasoned that the father's failure to act while he was "nearby" and heard the abuse was sufficient to uphold his conviction.¹³⁴ The court did not discuss *Willis v. State*,¹³⁵ where the Indiana Supreme Court reversed a conviction for battery against a single parent who had struck her child with a belt or extension cord, which caused some bruising.¹³⁶ It would seem that a parent who is present in the same home when the other parent is disciplining a child must take an active role to ensure discipline

496 (Ind. Ct. App. 1998); *Braster v. State*, 596 N.E.2d 278, 280 (Ind. Ct. App. 1992).

122. 903 N.E.2d 963 (Ind. 2009).

123. 916 N.E.2d 306 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 783 (Ind. 2010).

124. *Id.* at 308.

125. *Id.* at 309.

126. 929 N.E.2d 907 (Ind. Ct. App. 2010).

127. *Id.* at 911-12.

128. *Id.* at 912.

129. *Id.*

130. 933 N.E.2d 38 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 829 (Ind. 2010).

131. *Id.* at 43.

132. *Id.* at 42.

133. *Id.* at 43.

134. *Id.*

135. 888 N.E.2d 177 (Ind. 2008).

136. *Id.* at 184.

does not cross the line of “excessive force,” which was undoubtedly met in *Lay* but may not be clear in other cases.¹³⁷

3. *Jail Sex Not Necessarily a Crime*.—In *State v. Moore*,¹³⁸ several inmates in the Greene County jail removed ceiling tiles and climbed through the ceiling into a different cell block where they “would hang out, play cards, and have sex with each other.”¹³⁹ They were charged with escape, which occurs when a person “intentionally flees from lawful detention.”¹⁴⁰ Lawful detention includes “detention in a penal facility[.]”¹⁴¹ Because the inmates had no intent to leave the penal facility, the court held that the inmates could not be convicted of escape.¹⁴² The inmates may, however, have violated facility rules for which they could be punished administratively.¹⁴³ Judge Friedlander dissented, concluding that “lawful detention may exist *within* the boundaries of an institution, and such detention is separate and distinct from the detention inherent in being confined to the facility itself.”¹⁴⁴

4. *Explaining Verdict Can Undermine It*.—Although the appellate standard of review for sufficient evidence is usually a very deferential one, greater scrutiny could occur if a trial judge discusses its rationale for the verdict. In *Kribs v. State*,¹⁴⁵ a judge found a man guilty of entering a controlled area of an airport with a weapon, a Class A misdemeanor, at a bench trial.¹⁴⁶ After rendering the verdict, though, the trial judge stated that there was no “malicious intent” and he believed the defendant “didn’t remember” he had the gun in his possession when he entered the airport.¹⁴⁷ Had the judge remained silent, the court of appeals would have looked only to evidence that supported the verdict and “not have second-guessed such an assessment of the evidence.”¹⁴⁸ But based on the trial court’s post-verdict statements, the court of appeals was constrained to defer to the trial court’s express assessment of the witnesses and reverse the conviction.¹⁴⁹ Thus, although in some contexts judges must explain their decisions,¹⁵⁰ when

137. See generally *Matthew v. State*, 892 N.E.2d 695 (Ind. Ct. App. 2008) (affirming battery conviction by 2-1 vote because parental discipline was unreasonable).

138. 914 N.E.2d 304 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 560 (Ind. 2009).

139. *Id.* at 305.

140. IND. CODE § 35-44-3-5(a) (2011).

141. *Id.* § 35-41-1-18(a)(3).

142. *Moore*, 914 N.E.2d at 307.

143. *Id.*

144. *Id.* at 314 (Friedlander, J., dissenting).

145. 917 N.E.2d 1249 (Ind. Ct. App. 2009).

146. *Id.* at 1249.

147. *Id.* at 1250.

148. *Id.*

149. *Id.*

150. See *supra* Part II.A (discussing bail appeals); *accord* *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) (requiring trial courts to “enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence”); *Brown v. State*, 703 N.E.2d 1010, 1020 (Ind. 1998) (encouraging factual findings regarding serious evidentiary disputes in the jury

rendering a bench verdict, saying less may be better.

H. Transferred Intent Presents No Obstacle in Enhancing Offenses

At first blush, *D.H. v. State*¹⁵¹ seems like a straightforward case of transferred intent. During a verbal exchange between students in a classroom, one student threw a punch toward the other but missed and hit the teacher. Missing the intended victim and hitting someone else is not a defense.¹⁵² But if the student had struck the other student, he would have committed only a misdemeanor; the crime became a felony because he struck a teacher.¹⁵³ The court of appeals nevertheless upheld the felony conviction, reasoning that the State was required only to prove that D.H. “knowingly or intentionally struck *someone*, and then prove beyond a reasonable doubt that the victim happened to be a teacher.”¹⁵⁴ It relied on *Markley v. State*,¹⁵⁵ which held that “the culpability requirement applies only to the conduct of the statute.”¹⁵⁶

This principle from *Markley*, however, is hardly settled law. Indiana Code section 35-41-2-2(d) provides that the culpability required for the commission of an offense is “required with respect to every material element of the prohibited conduct.”¹⁵⁷ Case law interpreting the statute is “riddled with inconsistent interpretation,”¹⁵⁸ such as *Louallen v. State*,¹⁵⁹ which held that the statute “requires that the level of mental culpability required for commission of the offense itself is required with respect to *every element of the offense*—not every element of the *prohibited conduct*, as the statute requires, but every element of the *offense*.”¹⁶⁰ Although transfer was not sought in *D.H.*, the reach of intent to the other statutory elements of offenses is an issue likely to resurface in future appellate cases and cause continued confusion for trial courts when crafting jury instructions.¹⁶¹

I. Enhancing Drug Offenses Within 1,000 Feet of . . . Anything

The Indiana Supreme Court considered three cases involving enhanced crimes for drug offenses. Possessing or dealing cocaine is a felony but may be further enhanced when the defendant is within 1,000 feet of school property,

instruction context).

151. 932 N.E.2d 236 (Ind. Ct. App. 2010).

152. *Id.* at 238.

153. *Id.*

154. *Id.* at 239.

155. 421 N.E.2d 20 (Ind. Ct. App. 1981).

156. *D.H.*, 929 N.E.2d at 238 (citing *Markley*, 421 N.E.2d at 21-22).

157. IND. CODE § 35-41-2-2(d) (2011).

158. Graham C. Polando, *Markley's Forgotten Revolution: Connecting Mental States in Indiana's Criminal Code*, RES GESTAE 24, 24 (Jan./Feb. 2010).

159. 778 N.E.2d 794 (Ind. 2002).

160. Polando, *supra* note 158, at 26 (citation omitted).

161. *See id.*

public parks, family housing complexes, or youth program centers.¹⁶² Another statute provides a “defense” to the enhanced charge when:

- (1) a person was briefly in, on, or within one thousand (1,000) feet of school property, a public park, a family housing complex, or a youth program center; and
- (2) no person under eighteen (18) years of age at least three (3) years junior to the person was in, on, or within one thousand (1,000) feet of the school property, public park, family housing complex, or youth program center at the time of the offense.¹⁶³

In two cases decided on the same day, the Indiana Supreme Court clarified the procedures and burdens for this defense. The court adopted the approach applied in *Harrison v. State*,¹⁶⁴ which drew upon its analysis of the loaded/unloaded distinction in pointing a firearm cases from *Adkins v. State*.¹⁶⁵ Specifically, subsection 16(b) “constitutes a mitigating factor that reduces culpability, and therefore the defendant does not have the burden of proof but ‘only the burden of placing the issue in question where the State’s evidence has not done so.’”¹⁶⁶ Once the defense is put at issue,

the State must rebut the defense by proving beyond a reasonable doubt either that the defendant was within 1000 feet of a public park more than “briefly” or persons under the age of eighteen at least three years junior to the defendant were within 1000 feet of the public park¹⁶⁷

The term “briefly” is not defined in the statute, but the court defined it as “a period of time no longer than reasonably necessary for a defendant’s intrusion into the proscribed zone principally for conduct unrelated to unlawful drug activities, provided that the defendant’s activities related to the charged offense are not visible.”¹⁶⁸

In *Griffin v. State*,¹⁶⁹ the defendant was stopped at 2:15 a.m. near a school after being observed pushing his moped for five minutes.¹⁷⁰ The police officer testified that he did not see any children on or near the school property, which was sufficient to raise an issue under the second prong of the defense and require the State to rebut the defense.¹⁷¹ Because the defense could be defeated by the State rebutting either prong, the court then turned to the “briefly” issue of the first prong. The court emphasized the importance of context, reasoning that “the word

162. IND. CODE §§ 35-48-4-2, 35-6(b).

163. *Id.* § 35-48-4-16(b).

164. 901 N.E.2d 635 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 991 (Ind. 2009).

165. 887 N.E.2d 934 (Ind. 2008).

166. *Griffin v. State*, 925 N.E.2d 344, 347 (Ind. 2010) (quoting *Harrison*, 901 N.E.2d at 642).

167. *Id.*

168. *Id.* at 349-50.

169. 925 N.E.2d 344 (Ind. 2010).

170. *Id.* at 347.

171. *Id.* at 347-48.

implies that such duration must be determined in relation to other considerations, not merely an abstract, temporal component.”¹⁷² The term “could encompass a greater duration of time” when a defendant’s purpose in entering the proscribed zone was for a purpose other than illicit drug activities, whereas even a relatively short time period would qualify if the purpose for entering the zone was drug activity, “especially if such activity is visible to any children.”¹⁷³ Because the State proved neither that Griffin’s few minutes within the 1000-foot zone “lasted longer than reasonably necessary to push the moped down the street nor that his criminal activities while there would have been visible to any children if present,” the court reduced his B felony conviction for possession of cocaine to a D felony.¹⁷⁴

The court applied the same analytical framework but reached a different result in *Gallagher v. State*.¹⁷⁵ There, the State agreed that no one under the age of eighteen was present when the drug exchange occurred around 3:00 a.m. However, the defendant was in the proscribed zone for at least thirteen minutes, during which he was “principally engaged in conduct related to unlawful drug activities clearly visible to anyone present,” which the court concluded does not qualify as “briefly.”¹⁷⁶

In another cases, the supreme court considered the meaning of “a youth program center,” which also allows an enhancement under Indiana Code section 35-48-4-6. In *Whatley v. State*,¹⁷⁷ the court rejected vagueness and sufficiency challenges when the defendant was arrested near the Robinson Community Church (RCC).¹⁷⁸ Although the statute requires that youth programs or services be provided on a “regular” basis to qualify for the enhancement, the court found the statute did not fail for vagueness because “Whatley could have objectively discovered RCC’s status as a youth program center by observing young people entering and exiting the building on a regular basis—in fact, his residence faced RCC’s entrance.”¹⁷⁹ As to the sufficiency claim, the court cited several youth programs regularly offered at the church.¹⁸⁰

J. A New Guilty Plea Advisement

Most cases summarized in the survey apply a common law, statutory, or constitutional rule to a set of facts. *Hopper v. State*¹⁸¹ is a rare case, grounded

172. *Id.* at 349.

173. *Id.*

174. *Id.* at 350.

175. 925 N.E.2d 350 (Ind. 2010).

176. *Id.* at 354-55. The court also considered and rejected the defendant’s claim that he was within the proscribed zone “at the request or suggestion of a law enforcement officer or an agent of a law enforcement officer.” *Id.* at 355 (quoting IND. CODE § 35-48-4-16(c) (2010)).

177. 928 N.E.2d 202 (Ind. 2010).

178. *Id.* at 206-07.

179. *Id.* at 206.

180. *Id.* at 207.

181. 934 N.E.2d 1086 (Ind. 2010).

instead in the supreme court's supervisory power over lower courts.

Since 1975, *Faretta v. California*¹⁸² has required advising defendants of the dangers of self-representation at trial, but different considerations are at play when a defendant pleads guilty.¹⁸³ The Sixth Amendment generally does not require advisement of specific risks of waiving counsel before pleading guilty, but state courts are free to adopt guidelines they deem useful.¹⁸⁴ *Hopper* did just that, holding that Indiana affords rights beyond *Faretta*. Defendants must

also be informed that an attorney is usually more experienced in plea negotiations and better able to identify and evaluate any potential defenses and evidentiary or procedural problems in the prosecution's case. Such an advisement will require minimal additional time or effort at the initial hearing, and may encourage defendants to accept counsel.¹⁸⁵

Chief Justice Shepard, joined by Justice Dickson, dissented by posing several pointed questions:

How many innocent people are now pleading guilty without a lawyer because the judge did not tell them they could consult a lawyer? How many guilty people will decide not to plead guilty as the result of the "minimal" judicial intervention the majority says it contemplates? If indeed the advisement is likely to be minimal, does it tell offenders anything they didn't learn from television? How many repeat offenders will avoid the penalties they have otherwise earned because the warning was omitted or was found inadequate with the benefit of hindsight? How many victims will these repeat offenders create?¹⁸⁶

Because the *Hopper* rule applies only to future cases,¹⁸⁷ it would appear unlikely to lead to the wide-scale setting aside of guilty pleas and victimization by "repeat offenders." The *Benchbook*, which is widely used by Indiana trial judges as a guide for legal procedure, can easily be modified to include the advisement, which judges will routinely read to defendants. Rather than dissuading a defendant from pleading guilty, the advisement may encourage a defendant to engage the services of a lawyer, which the majority observed could lead to fewer defendants proceeding pro se and more expeditious proceedings with the assistance of counsel.¹⁸⁸ Finally, although it is difficult to know what the average defendant may have learned from television, most lawyer shows seem to focus on the glamour of trials instead of the "nitty-gritty" of plea negotiations.

182. 422 U.S. 806 (1975).

183. See *Hopper*, 928 N.E.2d at 1087.

184. *Id.* at 1088 (citing *Iowa v. Tovar*, 541 U.S. 77, 81 (2004)).

185. *Id.*

186. *Id.* at 1089 (Shepard, C.J., dissenting).

187. See *id.*

188. *Id.* at 1088 (majority opinion).

K. Inconsistent Verdicts Unassailable on Appeal

Although the supreme court went beyond minimum federal constitutional requirements in *Hopper*, it followed the same course as the United States Supreme Court in clarifying Indiana law on inconsistent verdicts. In *Beattie v. State*,¹⁸⁹ a jury found a defendant not guilty of the general offense of dealing cocaine but guilty of the more specific offense of dealing cocaine within 1000 feet of a family housing complex.¹⁹⁰ The court of appeals reversed because “the inconsistency in the jury’s verdict leaves us unable to determine what evidence the jury believed.”¹⁹¹

The United States Supreme Court had long held that inconsistent verdicts could result from “compromise” or “mistake” by the jury but nevertheless “cannot be upset by speculation or inquiry into such matters.”¹⁹² The Indiana Supreme Court had largely followed the same approach in refusing to interfere with inconsistent or irreconcilable jury verdicts.¹⁹³ The one prominent exception was *Marsh v. State*,¹⁹⁴ where the court declared that “perfectly logical” verdicts were not required, but “extremely contradictory and irreconcilable verdicts warrant correction action by this court.”¹⁹⁵

In *Beattie*, the supreme court overruled *Marsh* and returned to the federal rule of unassailability of inconsistent jury verdicts.¹⁹⁶ It aptly noted that such verdicts usually result from juries exercising lenity or as a “compromise among disagreeing jurors.”¹⁹⁷ Although defendants may no longer challenge such verdicts as inconsistent, any guilty verdict may be challenged on sufficiency grounds.¹⁹⁸

L. Sentencing

The Indiana Supreme Court resolved a split in appellate court decisions about the scope of appellate review for partially suspended sentences and clarified the use of scoring models in sentencing. The court of appeals increased a sentence for the first time on appeal, an issue certain to require supreme court intervention and clarification in the near future.

1. *Executed or Suspended Time*.—As explained in last year’s survey, a

189. 924 N.E.2d 643 (Ind. 2010).

190. *Id.* at 644.

191. *Id.* (quoting *Beattie v. State*, 903 N.E.2d 1050, 1057 (Ind. Ct. App. 2009), *rev’d*, 924 N.E.2d 643 (Ind. 2010)).

192. *Id.* at 645 (quoting *Dunn v. United States*, 284 U.S. 390, 394 (1932)).

193. *Id.* at 646.

194. 393 N.E.2d 757, 761 (Ind. 1979).

195. *Beattie*, 924 N.E.2d at 646 (quoting *Marsh*, 393 N.E.2d at 761).

196. *Id.* at 648. The court explained that “it is difficult, if not impossible, to give meaning to the *Marsh* requirement that challenged verdicts be ‘extremely’ contradictory and irreconcilable. . . The modifier ‘extremely’ is surplusage.” *Id.* at 647.

197. *Id.* at 649.

198. *Id.*

significant split in the court of appeals developed in recent years regarding the effect of a suspended sentence on appellate sentence review under Indiana Appellate Rule 7(B).¹⁹⁹ In *Davidson v. State*,²⁰⁰ the Indiana Supreme Court resolved that split. The court observed the “variety of options” beyond the length of a sentence that trial courts may order, including suspension of the sentence, probation, home detention, community corrections, or executed time in a department of correction facility.²⁰¹ Declining to interpret the term “sentence” narrowly, the court held that “appropriateness” review should consider “whether a portion of the sentence is ordered suspended or otherwise crafted using any of the variety of sentencing tools available to the trial judge.”²⁰² Rarely have appellate courts delved into such particulars; instead, they have reduced executed sentences at the department of correction.²⁰³ Nevertheless, the supreme court made clear that a reviewing court could determine a sentence to be inappropriate “due to its overall sentence length despite the suspension of a substantial portion thereof.”²⁰⁴ This is particularly significant because, as explained in last year’s survey, defendants challenging a sentence imposed after probation revocation face a much higher bar than the “appropriateness” standard on direct appeal in securing a reduction.²⁰⁵

2. *Scoring Models*.—Rarely do the Indiana Prosecuting Attorneys Council and Indiana Public Defender Council file amicus briefs on the same side of an issue. But when the Indiana Supreme Court sought amicus briefs in a case involving the use of scoring models by trial courts in sentencing,²⁰⁶ defense lawyers and prosecutors, joined by the state public defender and criminal justice and appellate practice sections of the Indianapolis Bar Association, voiced serious reservations.²⁰⁷ The Indiana Public Defender Council’s concern that such

199. Schumm, *supra* note 119, at 709-11.

200. 926 N.E.2d 1023 (Ind. 2010).

201. *Id.* at 1025.

202. *Id.*

203. See generally Schumm, *supra* note 12, at 948-51. But see *id.* at 951 n.151 (citing *Davis v. State*, 851 N.E.2d 1264, 1269 (Ind. Ct. App. 2006) (“reducing sentence of four years at DOC followed by two years at community corrections to ‘four years with the time remaining on her sentence to be served through Community Corrections so that she may continue to work to provide for her children and to pay restitution to the victims’”).

204. *Davidson*, 926 N.E.2d at 1025.

205. See Schumm, *supra* note 119, at 711.

206. *Malenchik v. State*, 928 N.E.2d 564 (Ind. 2010).

207. All of the amicus briefs in the case are posted on the Indiana Law Blog. See Brief of Amicus Curiae Ind. Prosecuting Attorneys Council, *Malanchik v. State*, No. 79S02-0908-CR-365, 928 N.E.2d 564 (Ind. 2010); Brief of Amicus Curiae Indianapolis Bar Ass’n, Criminal Justice & Appellate Practice Sections in Support of Appellant’s Petition to Transfer, No. 79S02-0908-CR-365, *Malanchik*, 928 N.E.2d 564; Brief of Transfer of Amicus Curiae Ind. Pub. Defender Council, No. 79S02-0908-CR-365, *Malanchik*, 928 N.E.2d 564; Brief of Pub. Defender of Ind. as Amicus Curiae, No. 79S02-0908-CR-365, *Malanchik*, 928 N.E.2d 564.

instruments are “unreliable” because they were not designed for sentencing²⁰⁸ and the Indiana Public Defender’s view that scoring models may infringe on a defendant’s right to confrontation or to present favorable evidence are not surprising.²⁰⁹ The Indiana Prosecuting Attorneys Council, however, expressed serious concern as well: “Most disturbing, the ‘score’ may be based on demographic factors beyond the control of the defendant. This conflicts with our basic principles of justice.”²¹⁰ The Indianapolis Bar Association expressed concern that

the mere recitation by judges of a numeric result from a scoring model, without some understanding of where it came from and what it means, may raise concerns about the fairness of the process and the ability of defendants, victims, and the public to understand and have confidence in the sentencing process and, more broadly, the criminal justice system.²¹¹

In *Malenchik v. State*,²¹² the Indiana Supreme Court acknowledged that scoring models like the Level of Service Inventory-Revised (LSI-R) “can be significant sources of valuable information for judicial consideration in deciding whether to suspend all or part of a sentence, how to design a probation program for the offender, whether to assign an offender to alternative treatment facilities or programs, and other such corollary sentencing matters.”²¹³ The scores do not, however, function as aggravating or mitigating circumstances or “substitute for the judicial function of determining the length of sentence appropriate for each offender.”²¹⁴ Moreover, defendants (and presumably the State) “may seek to diminish the weight to be given such test results by presenting contrary evidence or by challenging the administration or usefulness of the assessment in a particular case.”²¹⁵ The extent to which these scores are challenged at sentencing hearings will likely vary based on lawyers’ assessments of judicial reliance on the instruments and how damaging a particular score is perceived in a given case. Applying *Malenchik* on the same day it was decided, the supreme court in *J.S. v. State*²¹⁶ found no error in the trial court’s refusal to consider a defendant’s low LSI-R score of 13 as a mitigating circumstance.²¹⁷

3. *Increasing Sentences on Appeal*.—As summarized in last year’s survey,

208. Brief of Transfer of Amicus Curiae Ind. Pub. Defender Council, *supra* note 207, at 6-8.

209. Brief of Pub. Defender of Ind. as Amicus Curiae, *supra* note 207, at 7-8.

210. Brief of Amicus Curiae Ind. Prosecuting Attorneys Council, *supra* note 207, at 1-2.

211. Brief of Amicus Curiae Indianapolis Bar Ass’n Criminal Justice and Appellate Practice Sections in Support of Appellant’s Petition to Transfer, *supra* note 207, at 2-3.

212. 928 N.E.2d 564 (Ind. 2010).

213. *Id.* at 573.

214. *Id.*

215. *Id.* at 575.

216. 928 N.E.2d 576 (Ind. 2010).

217. *Id.* at 579. Although an adult defendant’s name is almost always used in criminal appeals, the court used initials in the case to identify the forty-nine-year-old defendant “to enhance the privacy of the child victim, his grandchild.” *Id.* at 577 n.1.

the longstanding understanding that appealing a sentence could not make matters worse changed in 2009 with *McCullough v. State*.²¹⁸ There, the Indiana Supreme Court made clear that “‘revise’ is not synonymous with ‘decrease,’ but rather refers to any change or alteration” and could include increases.²¹⁹ The appellate courts do not have an unfettered right to increase sentences on appeal.²²⁰ Rather, only when a defendant seeks revision of the sentence will the court consider “whether to affirm, reduce, or increase the sentence.”²²¹ In responding to such a challenge, the State may present reasons for an increased sentence.²²² The State may not initiate a sentencing challenge on appeal or cross-appeal, however.²²³

Just over a year after *McCullough* was decided, the court of appeals in *Akard v. State*²²⁴ exercised this power for the first (and, thus far, only) time in increasing a ninety-three-year sentence for several sex and confinement convictions in a graphic assault case to 118 years. The court relied on Justice Boehm’s concurring opinion in *McCullough*, which limited increases under Rule 7(B) to “the most unusual case[s].”²²⁵ The court found the case “most unusual” because of the defendant’s “demented purpose in attempting to satisfy his prurient interests in child bondage-style rape by performing similar acts on a homeless woman who possessed physical characteristics akin to those of a child.”²²⁶ In denying rehearing, the court of appeals found it inconsequential that the prosecutor had requested ninety-three years in the trial court and the attorney general had not requested an increase because the statutory range is the only limitation on the appellate court in reviewing a sentence on appeal.²²⁷ The supreme court granted transfer, vacating the court of appeals’s decision.²²⁸

Although the court of appeals’ opinion has been vacated, it highlights

218. 900 N.E.2d 745 (Ind. 2009).

219. *Id.* at 749-50.

220. The court is free, however, to correct an illegal sentence, as in *Young v. State*, 901 N.E.2d 624 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 552 (Ind. 2009). There, the defendant was convicted of D felony operating a vehicle while intoxicated (OVWI), which was enhanced for being a habitual substance offender (HSO). Most of the OVWI time and all of the HSO time was suspended. The mandatory HSO term is three to eight years, “[a]nd the trial court can only suspend that portion of the sentence in excess of three and a half years.” *Id.* at 626 (citing *Bauer v. State*, 875 N.E.2d 744, 750 (Ind. Ct. App. 2007)). Therefore, the case was remanded with instructions to order three and a half years executed time. *Id.* This meant the defendant, who had completed his 240-day sentence, would have to serve nearly a year and a half additional executed time in prison or community corrections, even with credit for good behavior.

221. *McCullough*, 900 N.E.2d at 750.

222. *Id.* at 751.

223. *Id.* at 750.

224. 924 N.E.2d 202 (Ind. Ct. App.), *vacated*, 937 N.E.2d 811 (Ind. 2010).

225. *Id.* at 211 (quoting *McCullough*, 900 N.E.2d at 751) (Boehm, J., concurring)).

226. *Id.* at 211.

227. *Akard v. State*, 928 N.E.2d 623, 625 (Ind. Ct. App. 2010).

228. The Indiana Supreme Court issued its opinion on December 9, 2010—after the survey period. *Akard v. State*, 937 N.E.2d 811 (Ind. 2010).

significant concerns for future cases and thus is worthy of discussion here. The Indiana Attorney General requested increased sentences on appeal in several cases in the months after *McCullough*.²²⁹ The basis for seeking an increase is not always clear, although a deputy attorney suggested that such requests occur when the trial court imposes a sentence less than the prosecutor's request.²³⁰ Increases would seem especially inappropriate when a party gets what it asks for in the trial court. For example, when a prosecutor asked the trial court to merge a theft conviction into a conviction for burglary, the supreme court refused to consider the State's claim on appeal that merger was inappropriate.²³¹ Parties may not take advantage of an error they commit, invite, "or which is the natural consequence of . . . [their] neglect or misconduct."²³² Thus, if the State does not ask for an increase on appeal but receives one, the result is the same (an increased sentence), if not more troubling. The elected trial judge can impose the lengthy sentence requested by the State and be reversed as too lenient on appeal.

All of this puts appellate counsel in a difficult, if not impossible, position in advising clients who seek to challenge a sentence on appeal because counsel is wholly unable to explain the parameters of when an increase might occur. There is a considerable and understandably gray area in sentencing.²³³ Trial courts are appropriately given latitude to craft a suitable sentence, and appellate courts then address appropriateness deferentially by considering "the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case."²³⁴ For example, although twenty years may not be the only "right" answer in a given case, fifty years may be too long or five years may be too short. Determining those parameters is especially difficult, if not impossible, under *Akard*. The opinion cited no guiding principle

229. See, e.g., *Poindexter v. State*, 926 N.E.2d 1133 (Ind. Ct. App.) (unpublished table decision), *trans. denied*, 940 N.E.2d 820 (Ind. 2010); *Arnold v. State*, 923 N.E.2d 30 (Ind. Ct. App. 2010) (unpublished table decision); *McClish v. State*, 921 N.E.2d 56 (Ind. Ct. App. 2010) (unpublished table decision); *McGuffin v. State*, 919 N.E.2d 614 (Ind. Ct. App. 2009) (unpublished table decision); *Davidson v. State*, 916 N.E.2d 954 (Ind. Ct. App. 2009), *vacated on transfer*, 926 N.E.2d 1023 (Ind. 2010); *Moore v. State*, 907 N.E.2d 179 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 555 (Ind. 2009); *Lewis v. State*, 905 N.E.2d 1104 (Ind. Ct. App. 2009) (unpublished table decision); *Atwood v. State*, 905 N.E.2d 479 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 556 (Ind. 2009); *Douglas v. State*, 904 N.E.2d 394 (Ind. Ct. App. 2009) (unpublished table decision).

230. The Indiana Supreme Court heard oral argument in *Akard* on November 4, 2010. The webcast may be accessed at INCITE, <http://mycourts.in.gov/arguments/default.aspx?view=detail&id=1114> (last visited Aug. 11, 2011).

231. *Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005).

232. *Id.* (citations omitted). But cf. *Miles v. State*, 889 N.E.2d 295, 296 (Ind. 2008) (refusing to apply the invited error doctrine when defense counsel requested a sentence no more than sixty-five years because "the trial court exercised discretion in determining Miles's sentence and Miles is entitled to contest the reasonableness of a trial court's sentencing discretion on appeal").

233. See *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008) (observing that there is "no right answer as to the proper sentence in any given case").

234. *Id.*

for the increase of twenty-five years but merely recited the graphic facts before concluding that “this is a most unusual case that warrants the extreme rarity of this [c]ourt invoking its authority to revise a defendant’s sentence upward.”²³⁵

A detailed statement of reasons seems like a minimal requirement before a sentence is increased on appeal. The Indiana Supreme Court has long held that “a sentencing statement identifying aggravators and mitigators retains its status as an integral part of the trial court’s sentencing procedure”²³⁶ and is crucial to “help both the defendant and the public understand why a particular sentence was imposed.”²³⁷ Before a sentence is altered on appeal, the defendant, the victim, lawyers, judges, and the public should have a clear understanding of the specific reasons for the increase.

Recent cases in which the supreme court reduced sentences included specific reasons and sometimes even citations to similar cases.²³⁸ Consider, for example, a couple of cases decided during the survey period. In *Knight v. State*,²³⁹ the court reduced a seventy-year sentence to forty years, relying heavily on a comparison to a co-defendant’s sentence, which had also been reduced on appeal, as well as the defendant’s youthful age of seventeen and criminal history that did not demonstrate “recalcitrance or depravity.”²⁴⁰ In *Rivers v. State*,²⁴¹ the supreme court ordered two consecutive terms of thirty years for child molesting to be served concurrently. The defendant had no prior convictions, maintained steady employment, and had “served as a father figure” to the victim for many years. The court found that the defendant’s violation of his position of trust as the

235. *Akard v. State*, 924 N.E.2d 202, 212 (Ind. Ct. App.), *vacated*, 937 N.E.2d 811 (Ind. 2010).

236. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007).

237. *Id.* (quoting *Abercrombie v. State*, 417 N.E.2d 316, 319 (Ind. 1981)).

238. Most notably, in *Smith v. State*, 889 N.E.2d 261 (Ind. 2008), the court cited the defendant’s minor criminal history and poor mental health balanced against his violation of the victim’s trust and psychological abuse in reducing a 120-year sentence to sixty years. The opinion included a string citation of cases to demonstrate that the revision was “consistent with this [c]ourt’s general approach to . . . [sentencing] matters.” *Id.* at 264-65.

239. 930 N.E.2d 20 (Ind. 2010).

240. *Id.* at 23. In a case decided a few months earlier, the court of appeals reiterated that no authority required proportional sentences for co-participants. *Abrajan v. State*, 917 N.E.2d 709, 713 (Ind. Ct. App. 2009). Regardless of whether proportional sentences are required, the Indiana Supreme Court appears willing to consider the sentence imposed against a co-defendant.

Even more troubling, the court of appeals in *Abrajan* appeared to fault the defendant for admitting “only to the rape” when the co-defendant admitted “all of his guilt.” *Id.* A defendant should not be required to plead guilty to every charge against him in order to receive mitigating weight on appeal. This should be especially true when a co-defendant who pleads guilty to multiple charges receives a shorter sentence. As the Indiana Supreme Court has made clear, appellate sentence review “should focus on the forest—the aggregate sentence—rather than the trees” *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008).

241. 915 N.E.2d 141 (Ind. 2009).

victim's uncle "deserve[d] a serious sanction."²⁴² However, the crimes did not occur over a long period of time, but rather involved two separate incidents in a short period of time—seven years before the defendant was charged.²⁴³

One way to constrain *McCullough* in a manner that will help appellate counsel advise clients and better ensure consistency would be to limit increases on appeal to cases where the trial court has disregarded one or more established sentencing principles. Limiting increases to cases involving an extreme violation of established sentencing principles would be consistent with the purpose of article 7, sections 4 and 6 of the Indiana Constitution, which were proposed in the 1960s and took effect as constitutional amendments approved by the voters in 1970.²⁴⁴ The framers of "these provisions had in mind the sort of sentencing revision conducted by the Court of Criminal Appeals in England."²⁴⁵ At the time of the amendment, the English system included "a complex and coherent body of sentencing principles and policy," which had been developed to realize the goal of eradicating disparities in the sentences imposed by trial courts.²⁴⁶

In reducing sentences, principles aimed at eradicating disparities have been applied in many cases. For example, consistent with English practice, in reducing sentences, the supreme court has taken an especially hard look at consecutive sentences, especially those involving the same victim.²⁴⁷ In England, trial courts also enjoy considerable discretion in imposing concurrent or consecutive sentences, but

the aggregate of the sentences imposed must bear some relationship to the gravity of the individual offences. Even for completely separate offences, it is not permissible to aggregate consecutive sentences so that a total is reached which is far in excess of what would be considered appropriate for the most serious of the individual offences.²⁴⁸

Although an increase may be warranted when a trial court imposes short,

242. *Id.* at 143.

243. *Id.* at 144.

244. *See Walker v. State*, 747 N.E.2d 536, 537 (Ind. 2001).

245. *Id.* at 537-38; *see also* JUDICIAL STUDY COMMISSION, REPORT OF THE JUDICIAL STUDY COMMISSION 140 (1966) ("The proposal that the appellate power in criminal cases include the power to review sentences is based on the efficacious use to which the power has been put by the Court of Criminal Appeals in England.").

246. D.A. Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193, 194, 197 (1968).

247. *See generally Serino v. State*, 798 N.E.2d 852, 857-58 (Ind. 2003).

248. Thomas, *supra* note 246, at 203. In reviewing sentences of defendants who plead guilty in England, "the Court of Appeal has formulated the principle that . . . an offender's remorse, expressed in his plea of guilty, may properly be recognized as a mitigating factor." *Id.* at 201. The supreme court has taken a similar view, recognizing that an early guilty plea saves the victims from going through a full-blown trial and conserves limited prosecutorial and judicial resources; therefore, it is a mitigating circumstance entitled to significant weight. *Francis v. State*, 817 N.E.2d 235, 238 (Ind. 2004).

concurrent sentences in a case with separate and extraordinary harm to multiple victims, the crimes in *Akard* were committed against the same victim.²⁴⁹ Moreover, an increase may be warranted for a defendant with a violent and lengthy criminal history who receives a near-minimum sentence, but the defendant there had a modest criminal history and received near-maximum and consecutive sentences.²⁵⁰

Requiring the recitation and application of these principles would ensure that any increase on appeal occurs with consistency and only in a most extreme and unusual case. The English appellate court “is clearly conscious of its policy making role” and appropriately “establishes policy not by dramatic declarations in isolated decisions but by regularly exhibiting the same approach to the same kind of case.”²⁵¹ Although sentencing appeals in Indiana are randomly assigned to rotating panels on the court of appeals, sentence revisions (both reductions and increases) should not be anything close to random. Rather, revisions should occur in a consistent manner grounded in principle and precedent. Appellate counsel has no idea which three judges will hear a case when advising a client whether to appeal a sentence, and some judges are more amenable to revisions than others. Limiting and better defining the ability of appellate courts to increase sentences is crucial to allow appellate counsel the ability to fulfill their ethical and constitutional responsibility to provide competent and effective advice to clients who seek to appeal their sentence. It is also essential to fulfill the laudable goal of the review and revise power; “a respectable legal system attempts to impose similar sentences on perpetrators committing the same acts who have the same backgrounds.”²⁵²

M. Probation

A pair of cases highlights limitations on the use of probable cause affidavits at probation revocation hearings. In *Davis v. State*,²⁵³ defense counsel admitted his client had been arrested for a crime while on probation.²⁵⁴ Although an admission by counsel is binding on the probationer, the majority nevertheless found insufficient evidence to support revocation because there was no admission of probable cause for the arrest.²⁵⁵ Moreover, the State offered no evidence that Davis had committed an offense; nor was the probable cause affidavit admitted into evidence.²⁵⁶ Judge Mathias dissented, noting that counsel did not simply admit an arrest but also an “agreement” for “twelve years” in prison, which

249. *Akard v. State*, 924 N.E.2d 202, 204-05 (Ind. Ct. App.), *vacated*, 937 N.E.2d 811 (Ind. 2010).

250. *Id.* at 211-12.

251. Thomas, *supra* note 246, at 197.

252. *Serino*, 798 N.E.2d at 854.

253. 916 N.E.2d 736 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 786 (Ind. 2010).

254. *Id.* at 740.

255. *Id.*

256. *Id.*

evidenced an agreement that his probation would be revoked.²⁵⁷

In *Figures v. State*,²⁵⁸ the court of appeals held that a trial court erred in admitting into evidence a probable cause affidavit “absent any foundation to establish its reliability.”²⁵⁹ Although the rules of evidence do not apply in probation hearings, hearsay evidence is only admissible if “substantially trustworthy.”²⁶⁰ Trial courts are encouraged to explain on the record why the hearsay is trustworthy, which did not occur in *Figures*; nor was any corroborating evidence offered.²⁶¹ Although the court had previously affirmed the revocation of probation in a case supported only by a probable cause affidavit,²⁶² the panel in *Figures* found that case distinguishable because it did not involve an affidavit from a case that was dismissed.²⁶³

Figures reiterated the general “risk of unreliability” in any probable cause affidavit.²⁶⁴ A case could be dismissed for a variety of reasons, though, which may have little to do with the probable cause affidavit. For example, one or more cases might be dismissed as part of a plea agreement to charges in another case.

The safer route for prosecutors and trial courts would be to avoid reliance on probable cause affidavits and instead secure an admission to the arrest with the stipulation that it was supported by probable cause or call a witness to establish the facts supporting the arrest. The burden of proof in probation proceedings is merely by a preponderance of the evidence,²⁶⁵ and securing a proper stipulation or calling a witness would seem to pose a minimal burden before revocation and a lengthy prison sentence. Simply proving some violation other than a new arrest (such as failing to report to probation or complete community service work) is a safer path to support revocation.²⁶⁶

N. Sex Offender Registry

As summarized in last year’s survey,²⁶⁷ the Indiana Supreme Court held in *Wallace v. State*²⁶⁸ that the Sex Offender Registration Act does not apply to defendants who committed offenses before the Act was enacted.²⁶⁹ That opinion spawned appellate opinions on a variety of related issues and new legislation to create a procedure for removal of *Wallace*-like defendants from the registry.

In the wake of *Wallace*, many defendants filed petitions in the court where

257. *Id.* at 741 (Mathias, J., dissenting).

258. 920 N.E.2d 267 (Ind. Ct. App. 2010).

259. *Id.* at 272.

260. *Id.* at 271.

261. *Id.* at 271-72.

262. *Id.* at 272 (citing *Whatley v. State*, 847 N.E.2d 1007 (Ind. Ct. App. 2006)).

263. *Id.*

264. *Id.* (quoting *Tate v. State*, 835 N.E.2d 499, 509 (Ind. Ct. App. 2005)).

265. *Id.*

266. *See id.*

267. Schumm, *supra* note 119, at 716-17.

268. 905 N.E.2d 371 (Ind. 2009).

269. *Id.* at 384.

they had been convicted requesting removal. Even a letter to the judge could sometimes result in removal from the registry.²⁷⁰ The 2010 legislation changed much of this, requiring a petition for removal to be filed in the circuit or superior court where the offender currently resides.²⁷¹ Non-resident offenders are required to file the petition in the county where they work or go to school.²⁷² The petition for removal must list information about each conviction (date, court, and whether by plea or trial), list each jurisdiction where the person is required to register, and be made under penalty of perjury.²⁷³ A petition may be summarily dismissed or set for a hearing.²⁷⁴ If a hearing is scheduled, notice must be given to the department of correction, attorney general, prosecuting attorney (where the petition was filed, where the offender was convicted, and where the offender resides), and the sheriff in the county of the offender's residence.²⁷⁵ In addition to the statutory requirements, the attorney general's office has requested that judges construct their removal orders to instruct the sex offenders that they may be required to register under the federal Sex Offender Registration and Notification Act (SORNA).²⁷⁶ Not surprisingly, some judges have been hesitant to "muddy the waters" with such language or overstep their jurisdiction.²⁷⁷

In the weeks after the statutory amendments, which took effect on March 24, 2010, the court of appeals affirmed the denials of motions that did not comply with (and had been filed months earlier than) the new procedures. For example, in *Wiggins v. State*,²⁷⁸ the court stressed that it did not "have enough information to make a determination as to whether Wiggins should be required to continue registering as a sexual violent predator."²⁷⁹ He was directed to file an amended petition that complied with the statutory requirements in the county in which he resides.²⁸⁰ Similar instructions were given to a defendant who filed the petition in Noble County, where he had pleaded guilty to child molesting in 1994 but was presently incarcerated in a state prison in Henry County on a sentence out of Huntington County.²⁸¹

Other cases were found not ripe for adjudication. For example, in *Gardner v. State*,²⁸² the court of appeals considered an ex post facto claim of a man currently incarcerated for a murder conviction. Although the man was convicted

270. See Rebecca S. Green, *Judges, State Duel over Sex Registry*, J. GAZETTE, July 12, 2010, available at <http://www.journalgazette.net/article/20100712/LOCAL03/307129994>.

271. IND. CODE § 11-8-8-22(d) (2011).

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. Green, *supra* note 270.

277. *Id.*

278. 928 N.E.2d 837 (Ind. Ct. App. 2010).

279. *Id.* at 838.

280. *Id.* at 840.

281. *Brogan v. State*, 925 N.E.2d 1285, 1290 (Ind. Ct. App. 2010).

282. 923 N.E.2d 959 (Ind. Ct. App. 2009).

in 1989, years before the violent offender registry was created, he was presently incarcerated and no evidence was offered that he “[had] been court-ordered to register as a violent offender, or that he . . . [had] been notified by any correctional authority or registry coordinator that he . . . [would] be required to register.”²⁸³

In *Vickery v. State*,²⁸⁴ the court of appeals relied heavily on *Jensen v. State*²⁸⁵ in finding no ex post facto violation from the designation of a defendant on the registry as a sexually violent predator (SVP). At the time of his guilty plea in 2000, Jensen was required to register as a sex offender for ten years.²⁸⁶ The 2006 amendments, however, classified him as a “sexually violent predator” and required lifetime registration.²⁸⁷ The plurality opinion, written by Justice Rucker and joined by Chief Justice Shepard, found that some of the *Mendoza-Martinez* factors weighed differently in distinguishing *Wallace*.²⁸⁸ As to the weighty seventh factor, the plurality emphasized that the “broad and sweeping” disclosure requirements were in effect in 2000 and that sexually violent predators may petition the trial court after ten years to have their status changed, which could result in removal from the registry.²⁸⁹ *Vickery* similarly emphasized that the defendant, who committed his offense after the registry was created but before the sexually violent predator (SVP) designation existed, had an opportunity to petition for removal of the SVP designation, which counseled against a conclusion that the act was punitive.²⁹⁰

Wallace seldom helps defendants convicted of sex offenses in other states. Indiana Code section 11-8-8-19(f) requires offenders who are required to register as a sex offender in another state to register in Indiana for the same period required in the other state. In *Herron v. State*,²⁹¹ the court rejected the ex post facto challenge of a man required to register for life under Arizona law because the registration requirement was in effect at the time of the offense.²⁹²

Not all registry offenders struck out, though. In *Hevner v. State*,²⁹³ the supreme court applied and extended *Wallace* to a defendant who committed possession of child pornography in 2005. The registry statute was amended in 2007 to include child pornography.²⁹⁴ The ex post facto clauses prohibit additional punishment for acts that were not punishable at the time of the

283. *Id.* at 960.

284. 932 N.E.2d 678 (Ind. Ct. App. 2010).

285. 905 N.E.2d 384 (Ind. 2009).

286. *Id.* at 388-89.

287. *Id.* at 389.

288. *Id.* at 391-94.

289. *Id.* at 394.

290. *Vickery v. State*, 932 N.E.2d 678, 682 (Ind. Ct. App. 2010).

291. 918 N.E.2d 682 (Ind. Ct. App. 2009).

292. *Id.* at 684.

293. 919 N.E.2d 109 (Ind. 2010).

294. *Id.* at 111 (citing IND. CODE § 11-8-4.5(a)(13) (2010)). Previously, first-time offenses did not qualify.

offense.²⁹⁵ Although the statute was amended before Hevner's trial and sentencing, he could not be ordered to register as a sex offender because doing so would impose additional punishment beyond what could have been imposed at the time of the offense.²⁹⁶

In *Blakemore v. State*,²⁹⁷ the court of appeals rejected some novel arguments by the State in a case involving a defendant convicted of an offense that was not part of the registry when committed in 1999.²⁹⁸ The State attempted to escape *Wallace*'s reach because the defendant agreed to follow the statutory guidelines for sex offender registration as part of his plea agreement.²⁹⁹ The court emphasized the contractual nature of a plea agreement and declined to enlarge the agreement beyond the statute at the time "to predict any changes in the law the legislature might subsequently enact, and to comply with any such changes."³⁰⁰ The court also rejected the State's argument that Blakemore was required to object to the constitutional concerns when he pleaded guilty because "neither he nor his counsel could be expected to predict what amendments our legislature might make to the sex offender registration act."³⁰¹

Finally, beyond the *ex post facto* realm, in *Branch v. State*,³⁰² the defendant was charged with failing to register a change of address. The court of appeals considered the meaning of the statutorily defined terms "principal residence" and "temporary residence" in the context of the defendant's claim that he was homeless.³⁰³ The majority upheld the conviction because the defendant failed to register a change of address from the homeless shelter where he lived for several days before staying in several different places for only a few days at a time.³⁰⁴ Judge Riley dissented, concluding that the charge did not reference the proper statutory section when the defendant had neither a principal nor a temporary residence.³⁰⁵

295. *Id.*

296. *Id.* at 112-13.

297. 925 N.E.2d 759 (Ind. Ct. App. 2010).

298. *Id.* at 760-61.

299. *Id.* at 762.

300. *Id.*

301. *Id.* at 762-63.

302. 917 N.E.2d 1283 (Ind. Ct. App. 2009).

303. *Id.* at 1284-85.

304. *Id.* at 1286.

305. *Id.* at 1287 (Riley, J., dissenting).

2009-2010 ENVIRONMENTAL LAW SURVEY

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INTRODUCTION¹

This Article surveys federal and Indiana court decisions decided between October 1, 2009 and September 30, 2010 that are most likely to affect the Indiana environmental law practitioner.²

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1. All opinions expressed in this article are solely those of its authors and should not be construed as opinions of Ice Miller LLP or any other person or entity.

2. Additional decisions that because of space constraints could not be addressed here, but that may nonetheless be of interest, include: *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010) (affirming Animal and Plant Health Inspection Service's (APHIS) decision to deregulate a genetically modified strain of alfalfa without completing a detailed environmental impact statement because respondents could not demonstrate irreparable harm); *Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497 (D.C. Cir. 2010) (NEPA); *Howmet Corp. v. EPA*, 614 F.3d 544 (D.C. Cir. 2010) (affirming summary judgment for EPA regarding RCRA violations by aerospace parts manufacturer); *Reckitt Benckiser Inc. v. EPA*, 613 F.3d 1131 (D.C. Cir. 2010) (reversing dismissal of suit challenging EPA's labeling of pesticide products as misbranded under FIFRA without commencing cancellation proceedings); *Habitat Education Center v. U.S. Forest Service*, 609 F.3d 897 (7th Cir. 2010) (NEPA); *General Electric Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010) (holding that EPA pattern and practice of administering CERCLA's unilateral administrative orders (UAOs) system did not violate Due Process clause; harm to stock price, brand value, and credit worthiness as a result of UAO was not a deprivation of property interest; and rejecting plaintiff's *Ex Parte Young* challenge to UAOs), *cert. denied*, 2011 WL 2175219 (June 6, 2011); *Muscarello v. Ogle County Board of Commissioners*, 610 F.3d 416 (7th Cir. 2010) (holding that county's approval of special use permits for the construction of windmills on adjacent property was not a "taking"; nuisance and trespass claims were not ripe for adjudication where none of the permitted windmills had yet been constructed); *Commuter Rail Division of the Regional Transportation Authority v. Surface Transportation Board*, 608 F.3d 24 (D.C. Cir. 2010) (NEPA); *American Trucking Assoc. v. EPA*, 600 F.3d 624 (D.C. Cir. 2010)

Continuing on the developments from the prior survey period, this year's survey period presented several key decisions. In Part I, we survey issues surrounding the Clean Air Act (CAA),³ including decisions applying the statute of limitations, review of the U.S. Environmental Protection Agency's ("U.S. EPA") ambient air standards, and retroactive application of new U.S. EPA cap-and-trade rules. In Part II, we discuss federal cases involving the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), including certification of a RCRA class action, dismissal of a RCRA open dumping claim, apportionment of liability under CERCLA to both parties, whether motor vehicles are "facilities" under CERCLA, and the interplay of corporate law and statutes of limitation for CERCLA claims. Part III examines cases involving water rights including two United States Supreme Court decisions. In Part IV, this Article considers recent environmental case law arising under state law, including a federal appellate court's review of attorneys' fees and costs under Indiana's Underground Storage Tank Act (USTA) and the state appellate court's reversal of summary judgment regarding the economic loss doctrine as applied to an environmental negligence claim. Finally, Part V examines recent opinions that may impact environmental insurance coverage cases under Indiana law.

I. DEVELOPMENTS IN CLEAN AIR ACT CASES

In Part I, we survey issues surrounding the CAA, including decisions applying the statute of limitations, review of U.S. EPA's ambient air standards, and retroactive application of new U.S. EPA cap-and-trade rules.

A. Statute of Limitations Bars PSD Claim: Sierra Club v. Duke Energy Indiana, Inc.

Sierra Club filed suit against Duke Energy Indiana, Inc. ("Duke") alleging Duke violated the Prevention of Significant Deterioration ("PSD") provisions of

(holding that EPA's grant of preemption waiver for California's emission standards for in-use, non-road engines—specifically, diesel-powered refrigeration units—should be upheld; rule did not impose de facto national rule; and EPA adequately considered industry's costs of compliance); *North Carolina v. EPA*, 587 F.3d 422 (D.C. Cir. 2009) (finding that North Carolina lacked standing to challenge EPA's action removing part of Georgia from measurement of ozone while making local National Ambient Air Quality Standard (NAAQS) determination); *Burnett & Morand Partnership v. Estate of Lora L. Youngs*, No. 3:10-cv-3-RLY-WGH, 2010 WL 3703356 (S.D. Ind. Sept. 10, 2010) (allowing amended complaint under RCRA seeking injunctive relief); *In re Endangered Species Act Section 4 Deadline Litigation*, 716 F. Supp. 2d 1369 (U.S. J.P.M.L. 2010); *Pardue v. Pardue Farms Inc.*, 925 N.E.2d 482 (Ind. Ct. App. 2010) (affirming judgment in favor of turkey farmer because plaintiff horse breeder could not establish that turkey farmer's operation constituted a nuisance); *Cinergy Corp. v. St. Paul Surplus Lines Ins. Co.*, 915 N.E.2d 524 (Ind. Ct. App. 2010) (holding that excess liability insurers did not owe coverage to Cinergy based on prior court rulings that the evidence failed to show an occurrence during the policy periods).

3. 42 U.S.C. §§ 7401-7671 (2006 & Supp. 2009).

the CAA⁴ at its Edwardsport generating station in Indiana by undertaking a series of maintenance projects without obtaining the necessary permits.⁵ In order to prevent further deterioration of air quality, the PSD provisions of the CAA require that prior to a company making any “major modification” at a facility, that company must obtain a permit from the appropriate issuing governmental agency⁶ to make sure the modification considers emission limits and controls to the extent compliant with “best available control technology” (BACT). Sierra Club sought both civil penalties as well as equitable relief. Duke argued that any civil penalty claim was time-barred by the statute of limitation and the equitable relief requested was barred by the concurrent remedy doctrine.⁷

Claims brought under the CAA are subject to the general federal five-year statute of limitation.⁸ Duke argued that the PSD provisions were solely preconstruction requirements and therefore time-barred by the statute of limitations since construction at the facility took place more than five years before the suit was filed; Sierra Club claimed the violations were ongoing and therefore not time-barred.⁹ While the question of whether PSD applies not just to construction but also to operations has not been directly answered by the Seventh Circuit, the court did find supporting decisions that have held that PSD violations are not continuing in nature, but rather accrue no later than the time at which construction is complete.¹⁰ The court held that the violations of PSD provisions are discrete infractions governed by the five-year statute of limitation and are not continuing violations.¹¹ The PSD requirements are under a section of the CAA entitled “Preconstruction Requirements” and contain construction requirements, but they are silent as to the subsequent operation of the facility, and other sections of the CAA clearly establish operational conditions.¹² Sierra Club attempted to make the BACT analysis under PSD an ongoing compliance obligation, but the court disagreed here as well, finding that BACT is also a one-time obligation tied to the construction process.¹³

In regards to the claims for equitable relief, Duke argued that Sierra Club’s claims were barred by the concurrent remedy doctrine. In the Seventh Circuit, this doctrine states that where “the sole remedy is not in equity and an action at

4. *Id.* §§ 7470-92.

5. *Sierra Club v. Duke Energy Ind., Inc.*, No. 1:08-cv-437-SEB-TAB, 2010 WL 3667002, at *1 (S.D. Ind. Sept. 14, 2010).

6. While Indiana has now been granted authority to issue permits under PSD, at the time the projects subject to this litigation occurred, PSD approval had not been granted, and U.S. EPA was responsible for reviewing and issuing PSD permits.

7. *Id.* at *4-5.

8. *Id.* at *4 (citing 28 U.S.C. § 2462).

9. *Id.* at *4-5.

10. *Id.* (citing *Sierra Club v. Franklin Cnty. Power of Ill., LLC*, 546 F.3d 918, 928 (7th Cir. 2008); *United States v. Midwest Generation, LLC*, 694 F. Supp. 2d 999, 1008 (N.D. Ill. 2010)).

11. *Id.* at *9.

12. *Id.* at *7-8.

13. *Id.* at *9-10.

law can be brought on the same facts, the remedies are concurrent for purposes of the [concurrent remedy doctrine] even though more effective relief would be available in equity.”¹⁴ The court held that in this case, because the Sierra Club’s claims for civil penalty are based on the same set of facts as the equitable relief, the claim for equitable relief is also barred by the concurrent remedy doctrine.¹⁵ The court did acknowledge that a different result was found in *United States v. Cinergy Corp.*¹⁶ and noted that it is well-established that the concurrent remedy doctrine does not apply to suits brought by the United States in its official enforcement capacity.¹⁷ Sierra Club also made an attempt to challenge Duke’s compliance with its CAA Title V permit, but the court determined that Sierra Club failed to follow the administrative process of challenging the Title V permit when the permit was issued, and therefore, the claim was not ripe.¹⁸

*B. U.S. EPA’s Ambient Air Lead Standard Affirmed:
Coalition of Battery Recyclers Ass’n v. EPA*

This case involved a challenge of the U.S. EPA’s revision of the primary and secondary National Ambient Air Quality Standards (NAAQS) for lead.¹⁹ Under the CAA, U.S. EPA is responsible for setting emission standards for various pollutants to protect public health and welfare.²⁰ In 2004, U.S. EPA began to review the emission limits set for lead and concluded that there is no recognizable safe level of lead in children’s blood, warranting revision of the standards.²¹ The Plaintiffs challenged U.S. EPA’s revision, arguing that it was overprotective and that there was not a sufficient record for the new standard; reliance on certain studies was arbitrary and capricious; and setting the level itself was arbitrary and capricious.²² The court disagreed.

First, the court found the plaintiffs’ argument that the lead standard was overprotective because it focused on a “sensitive population” of young U.S. children rather than focusing only on the entire U.S. children population unpersuasive.²³ The scientific information on which U.S. EPA relied was sufficient to allow it to focus on revising the NAAQS to protect the subset of children likely to be exposed to airborne lead, and therefore, the revision was not arbitrary or capricious.²⁴ The Plaintiffs also challenged U.S. EPA’s reliance on

14. *Id.* at *9 (quoting *Nemkov v. O’Hare Chi. Corp.*, 592 F.2d 351, 355 (7th Cir. 1979)).

15. *Id.* at *10.

16. 397 F. Supp. 2d 1025 (S.D. Ind. 2005).

17. *Duke Energy Ind., Inc.*, 2010 WL 3667002, at *10 n.18.

18. *Id.* at *11.

19. *Coal. of Battery Recyclers Ass’n v. Env’tl. Prot. Agency*, 604 F.3d 613 (D.C. Cir. 2010).

20. 42 U.S.C. §§ 7408-09 (2006).

21. *Coal. of Battery Recyclers Ass’n*, 604 F.3d at 616 (citing 40 C.F.R. § 50.12 (2010)).

22. *Id.* at 617.

23. *Id.* at 617-18.

24. *Id.* at 618-19.

IQ data rather than blood levels since IQ levels are more uncertain.²⁵ However, the court agreed with the record of scientific evidence presented by U.S. EPA to demonstrate that IQ levels were affected by lead exposure and met its obligation to protect the public health, including sensitive groups.²⁶ The plaintiffs further challenged the scientific studies relied upon by U.S. EPA in setting the new NAAQS, but the court again reviewed the record established by U.S. EPA and concluded that the agency had engaged in reasoned decisionmaking and should be permitted as the regulatory agency to “err on the side of caution by setting primary NAAQS that ‘allow[] an adequate margin of safety.’”²⁷

*C. U.S. EPA Cannot Retroactively Enforce New Cap-and-Trade Rules:
Arkema Inc. v. EPA*

In *Arkema Inc. v. EPA*,²⁸ the D.C. Circuit vacated part of a final rule promulgated by the U.S. EPA that allocated allowances for the production of ozone-depleting substances, hydrochlorofluorocarbons (HCFCs), under a cap-and-trade system pursuant to Title VI of the CAA.²⁹ Pursuant to the Final Rule, U.S. EPA had previously authorized companies to make permanent inter-pollutant trades of the substances, and it later approved a number of such trades by companies that included Arkema.³⁰ Subsequently, in the rule at issue in this case, U.S. EPA took the position that permanent inter-pollutant trades were never permissible, and it refused to give effect to prior trades by certain companies, including Arkema.³¹ Arkema challenged U.S. EPA’s actions, arguing that the final rule was arbitrary and capricious and had an impermissibly retroactive effect as to its HCFC baseline allowances.³² The court agreed with Arkema’s position and vacated the Final Rule insofar as it operated retroactively.³³ However, the court did state that the U.S. EPA could limit inter-pollutant trades to a single year and prohibit inter-pollutant baseline transfers.³⁴

25. *Id.* at 618.

26. *Id.* at 619.

27. *Id.* at 621 (quoting *Am. Trucking Ass’n v. EPA*, 283 F.3d 355, 369 (D.C. Cir. 2002)).

28. 618 F.3d 1 (D.C. Cir. 2010).

29. *Id.* at 3, 10 (citing 42 U.S.C. § 7671 (2006)). The rule, Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export, 40 C.F.R. § 82 (2009) (“Final Rule”), was promulgated pursuant to § 607 of the CAA, 42 U.S.C. § 7671f.

30. *Arkema Inc.*, 618 F.3d at 2-3.

31. *Id.* at 3-7.

32. *Id.* at 3-4.

33. *Id.* at 3, 10.

34. *Id.* at 10.

D. Vague State Air Regulations Are Not Enforceable in a Private Suit:
McEvoy v. IEI Barge Services, Inc.

The Seventh Circuit recently ruled in *McEvoy v. IEI Barge Services, Inc.*³⁵ that the citizen suit provision of the CAA³⁶ cannot be used to enforce state environmental regulations lacking objectively measurable metrics.³⁷ In that case, Charles McEvoy filed suit under the citizen-suit provision of the CAA against a neighboring company, IEI Barge Services, Inc., because coal dust from IEI's coal handling operations was drifting into his home. Other neighbors subsequently filed similar suits against IEI. The theory of recovery in all of these suits was that IEI's violation of two Illinois environmental regulations³⁸ provided plaintiffs with a remedy under the CAA.³⁹

The Seventh Circuit, however, found that McEvoy and the other neighbors' claims fell outside the scope of the CAA. In reaching this conclusion, the court explained that the citizen-suit provision of the CAA only permits a private action against a person who is alleged to have violated an "emission standard or limitation" under the CAA.⁴⁰ The court further noted that to be enforceable under the CAA, the Illinois regulations at issue had to qualify as either an "emission limitation, standard of performance or emission standard,"⁴¹ or "any other standard, limitation, or schedule established under any permit issued pursuant to . . . [another section of the Act] or under any applicable State implementation plan."⁴² The Seventh Circuit found that neither Illinois regulation met this requirement. In reaching this conclusion, the court explained that the first regulation the plaintiffs sought to enforce (entitled "Prohibition of Air Pollution") was little more than a statement that "thou shall not pollute."⁴³ The court concluded that the broad statement did not qualify as a standard or limitation enforceable under the CAA but was merely a statement of principle prohibiting air pollution.⁴⁴ The second regulation, the "fugitive particulate matter" regulation,⁴⁵ contained more specifics than the general prohibition, but it fell far short of other highly specific standards contained in Illinois's regulations.⁴⁶ In particular, the court noted that other Illinois regulations contained specific metrics subject to objective measurement which were not found in the fugitive particulate

35. 622 F.3d 671 (7th Cir. 2010).

36. 42 U.S.C. § 7604(a) (2006).

37. *McEvoy*, 622 F.3d at 677-80.

38. ILL. ADMIN. CODE tit. 35, §§ 201.141, -.301 (2011).

39. *McEvoy*, 622 F.3d at 672-74.

40. *Id.* at 674-75 (citing 42 U.S.C. § 7604(a)(1)).

41. *Id.* at 674 (quoting 42 U.S.C. § 7604(a)(1)).

42. *Id.* (quoting 42 U.S.C. § 7604(f)(4)).

43. *Id.* at 678 (citing ILL. ADMIN. CODE tit. 35, § 201.141).

44. *Id.*

45. ILL. ADMIN. CODE tit. 35, § 212.301.

46. *McEvoy*, 622 F.3d at 678-80.

matter regulation.⁴⁷ Furthermore, because there was no guidance or definitions to guide a court in interpreting the fugitive particulate matter regulation, the court concluded that the regulation was not specific enough for judicial enforcement and therefore could not be enforced through the CAA.⁴⁸

II. DEVELOPMENTS IN FEDERAL REGULATION OF RCRA AND CERCLA

This year, several key opinions were rendered involving RCRA and CERCLA. The Southern District of Indiana certified a RCRA class action matter, dismissed a RCRA open dumping claim, and found that administratively dissolved corporations could not avoid CERCLA liability. The Northern District of Indiana issued opinions determining that liability under CERCLA applied to both parties involved in a suit and held that motor vehicles are not “facilities” under CERCLA.

A. *Class Action Certified Based on Anticipated Geographic Boundaries of Solvent Plume: Stoll v. Kraft Foods Global, Inc.*

In *Stoll v. Kraft Foods Global, Inc.*, one hundred families (“Residents”) petitioned for class certification regarding environmental issues following releases of trichlorethene (TCE) and tetrachlorethene (PCE) from a facility in Attica, Indiana operated by Kraft’s predecessors—first, P.R. Mallory & Co (“Mallory”), and later Radio Materials Corp. (RMC)—from 1957 until 1978.⁴⁹ Residents’ proposed class consisted of “all persons and non-governmental entities that own residential property or reside on property located within specified geographic boundaries in Attica.”⁵⁰ In this opinion, Judge Pratt certified the class, reserving reevaluation of the class, if necessary, based on future developments in the record.⁵¹

The defendants opposed the class certification by (1) objecting to Residents’ evidence of contamination supporting the proposed class definition; (2) objecting to Residents’ use of “geographic boundaries” for the class; and (3) arguing that the representatives were not “adequate representatives” for the class.⁵² As indicated above, none of these arguments were sufficient to defeat Residents’ motion.

As to the evidence supporting class certification, the court found that debates regarding expert testimony evidence should not be entertained at the class certification stage.⁵³ The court would not “jump the gun and assess the parties’

47. *Id.* at 679.

48. *Id.* at 679-80.

49. *Stoll v. Kraft Foods Global, Inc.*, No. 1:09-CV-0364-TWP-DML, 2010 WL 3613828, at *1 (S.D. Ind. Sept. 6, 2010).

50. *Id.*

51. *Id.* at *2.

52. *Id.* at *2-3.

53. *Id.* at *3.

estimations from the sampling data.”⁵⁴ The court refused what it viewed as Kraft’s “invit[ation] . . . to weigh the credibility of the parties’ experts and evidence.”⁵⁵ The court noted that the class definition was made based on Kraft’s own expert’s identification of the “potentially problematic” area. Finally, prior to the determination of the class, Kraft had offered to install vapor mitigation systems in homes occupied by class members. While Kraft argued that it made the offer “merely [as] a proactive, preventative measure” and that the offer should not be considered relevant to class certification.⁵⁶ Nevertheless, the court found Kraft’s willingness to install these systems “suggests the possibility that . . . [Residents] have correctly circumscribed the geographic boundaries.”⁵⁷

Second, the court did not agree that the class needed to be defined in terms of environmental impact rather than geographic scope. Kraft argued that defining the class by geographic terms, rather than environmental impact, failed to link the class to “actual or threatened contamination of property.”⁵⁸ The court disagreed and found that the proposed class was “reasonable, closely tied to geographic boundaries, and based on . . . [Kraft’s] alleged conduct.”⁵⁹ The court tried to balance the Seventh Circuit’s admonition that it should “not accept . . . [Residents’] allegations and statements in lockstep”⁶⁰ with Supreme Court precedent that courts do not have “license to weigh evidence and determine merits at the class certification stage.”⁶¹

Third, Kraft argued that Residents failed to show that the proposed class had adequate representation. Kraft argued that the difference in circumstances between homeowners, landlord owners, and renters meant that each group would be required to prove a separate set of damages. Kraft suggested that the divergent interests would result in irreconcilable conflicts and inadequate representation.⁶² The court disagreed. The court found that all Residents shared an aligned interest in holding Kraft liable for the contamination.⁶³ In addition, even if there were differences in the anticipated damages, the court believed an “individualized assessment of damages” would be necessary.⁶⁴ Thus, “the existence of administrative hiccups related to calculating damages . . . [did] not establish that Plaintiffs have interests antagonistic to or in conflict with other [c]lass members.”⁶⁵

It is worthwhile to note that the court specifically cited case law permitting

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at *4.

59. *Id.*

60. *Id.* (citing *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2011)).

61. *Id.* (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)).

62. *Id.* at *6.

63. *Id.* at *7.

64. *Id.*

65. *Id.*

a district court to revisit its class certification decision at a later time, before final judgment is rendered.⁶⁶ Therefore, the court indicated that Kraft could raise future developing issues with class certification after such issues were ripe. For all of these reasons, the court certified the class under Federal Rule of Civil Procedure 23.

Simultaneous with her certification of the class action, the court denied Kraft's motion to dismiss or stay the case.⁶⁷ Kraft argued that it was entitled to relief from Residents' complaint because Kraft was currently working with U.S. EPA to complete investigative and remedial activities at the site. In March 2009, Residents filed their complaint asserting five legal theories: (1) negligence, (2) private nuisance, (3) trespass, (4) willful and wanton misconduct, and (5) a claim under RCRA.⁶⁸ Kraft argued that the court should abstain from deciding the case while the U.S. EPA rendered its decisions regarding the clean-up, or alternatively, that Residents' complaint: (a) failed to properly plead a RCRA claim, (b) was moot as to its claims for injunctive relief, and (c) Residents' common law claims were preempted by Residents' RCRA claim.⁶⁹

As discussed above, the site had been subject to investigation for several years, and in 1999, U.S. EPA issued an order compelling RMC to investigate the site.⁷⁰ Kraft was not a party to that order, but in 2002, Kraft agreed to provide RMC with "financial and implementation assistance" regarding the Attica, Indiana site.⁷¹ Among other activities, Kraft hired a consulting firm, CRA, to investigate and remediate the site.⁷² This work included investigation of the site to delineate groundwater impacts, excavation of impacted soils, injection of treatments into soils, and installation of soil vapor extraction systems.⁷³ Thereafter, Kraft formally notified Residents regarding the contamination and agreed to install vapor mitigation systems in 125 homes.⁷⁴ At the time of the order, Kraft had submitted a corrective measures work plan, U.S. EPA had commented on that plan, and Kraft was responding to those comments.⁷⁵

First, the court rejected Kraft's arguments that the court should abstain from considering the civil complaint until after the U.S. EPA determined its investigative and remedial actions were substantially complete.⁷⁶ Kraft argued that under the doctrine of primary jurisdiction, the court should abstain from

66. *Id.* (citing *Alliance to End Repression v. Rochford*, 565 F.2d 975, 977 (7th Cir. 1977)).

67. *Stoll v. Kraft Foods Global, Inc.*, No. 1:09-cv-0364-TWP-DML, 2010 WL 3702359 (S.D. Ind. Sept. 6, 2010).

68. *Stoll*, 2010 WL 3613828, at *4.

69. *Stoll*, 2010 WL 3702359, at *1.

70. *Id.* at *2.

71. *Id.*

72. *Id.* at *3.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at *5.

“second-guessing U.S. EPA’s decisions” during the administrative process.⁷⁷ The court considered the factors established by the Seventh Circuit for considering whether to abstain. Specifically, a court weighs: (1) whether the decision is one outside the “conventional experience of judges”; (2) whether permitting the case to proceed could result in conflicting orders; (3) whether agency proceedings have been initiated; (4) whether the agency has demonstrated diligence or if the issue has languished; and (5) whether the court can provide the type of relief requested by the plaintiff.⁷⁸ The court found that these factors supported a finding that Residents’ suit should proceed. First, while courts do not “confront esoteric environmental issues on a daily basis,” Congress had expressly authorized private lawsuits under RCRA; thus, if the court were to apply the primary jurisdiction doctrine to a private right of action authorized under RCRA, it would “amount to an abdication of Congressionally-vested responsibility.”⁷⁹ Second, the court noted that while Kraft had been participating in the process through its agreement with RMC, it was not a party to, or necessarily bound by, the 1999 U.S. EPA order.⁸⁰ Even if Kraft was a party to the agreement, the court found that by “listening to any [U.S. EPA] proposed orders, the [c]ourt is confident that it can fashion a non-conflicting remedy.”⁸¹ Third, while Kraft argued the fact that U.S. EPA proceedings at the site were ongoing, the court again noted that Kraft was not an actual party to the U.S. EPA order and technically, no proceedings were ongoing against Kraft.⁸² Fourth, while the U.S. EPA order was issued eleven years prior, “final corrective measures have yet to be developed, let alone effectuated.”⁸³ Finally, based on Congress’s directive in support of private suits under RCRA, the court was confident that it could fashion a non-conflicting order.⁸⁴ For all of these reasons, the court found that the primary jurisdiction argument did not apply to this case.

Kraft also argued that because remediation was incomplete, “damages cannot be calculated with sufficient certainty,” and therefore, the dispute was not ripe for adjudication.⁸⁵ But the court found this argument premature at the pleading stage. Distinguishing *Allgood v. General Motors Corp.*,⁸⁶ the court concluded that a motion to dismiss could not sufficiently evaluate the merits of Residents’ damages claims.⁸⁷

The court next rejected Kraft’s argument that Residents had failed to demonstrate an imminent and substantial endangerment. Kraft argued that its

77. *Id.*

78. *Id.* at *5-6 (citing *Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1169 (D. Wyo. 1998)).

79. *Id.* at *6.

80. *Id.* at *7.

81. *Id.*

82. *Id.* at *8.

83. *Id.*

84. *Id.*

85. *Id.*

86. No. 1:02-cv-1077-DFH-TAB, 2006 WL 2669337 (S.D. Ind. Sept. 18, 2006).

87. *Stoll*, 2010 WL 3702359, at *9.

involvement with U.S. EPA removed any “imminent and substantial danger” because the remediation was ongoing.⁸⁸ The court disagreed because the complaint alleged an imminent and substantial harm, and the cases cited by Kraft either were not decided at the pleadings stage or involved sites over which remediation had been entirely completed.⁸⁹

Next, Kraft argued that Residents’ request for injunctive relief was moot because “[t]here is no injunctive relief available . . . that is not already being required by U.S. EPA.”⁹⁰ Again, the court rejected this argument because Kraft was not a direct party to the U.S. EPA order, the work plan was not finalized, and the cases cited by Kraft were decided at the summary judgment stage.⁹¹ The court found that this case was better governed by those cases where a remedial plan was still being developed, and it denied the motion to dismiss for that reason.⁹²

Finally, Kraft’s argument that Residents’ common law claims were preempted by RCRA was also rejected.⁹³ The court again noted that Kraft was not technically a party to the U.S. EPA order. Furthermore, Kraft’s cited case involved an U.S. EPA order under 42 U.S.C. § 6973 (which precludes private citizen-suits), whereas the U.S. EPA order regarding the site was issued under 42 U.S.C. § 6928(h), which does not serve as a bar to citizen-suits.⁹⁴ Finally, RCRA’s statutory language does not support this conclusion; rather, it states: “Nothing in this section shall restrict any right which any person . . . may have under . . . *common law*. . . .”⁹⁵ For these reasons, the court concluded that “Congress sought to preserve state common law actions under § 6972.” For all of these reasons, the court rejected Kraft’s motion to dismiss, and Residents’ suit was permitted to proceed.⁹⁶

B. RCRA Open Dumping Claim Requires Current Activity by Defendants:
Mervis Industries, Inc. v. PPG Industries, Inc.

From 1895 until approximately 1931, PPG Industries, Inc. (“PPG”) operated glassmaking operations in Kokomo, Indiana.⁹⁷ While PPG still owns part of that facility, two properties were later acquired by Mervis Industries, Inc. (“Mervis”). Between 1991 and 2007, Mervis operated an auto shredding and scrap metal yard

88. *Id.* at *10.

89. *Id.*

90. *Id.* (citation omitted).

91. *Id.* at *10-11.

92. *Id.* at *11 (citing *Morris v. Primetime Stores of Kansas, Inc.*, No. 95-1328-JTM, 1996 WL 563845, *3-4 (D. Kan. Sept. 5, 1996); *Lambrinos v. Exxon Mobil Corp.*, No. 1:00-CV-1734, 2004 WL 2202760, *2, 6-7 (N.D.N.Y. Sept. 29, 2004)).

93. *Id.* at *11-12 (citing *Feikema v. Texaco, Inc.*, 16 F.3d 1408 (4th Cir. 1994)).

94. *Id.* at *12.

95. *Id.* (citing 42 U.S.C. § 6972(f) (2006)).

96. *Id.*

97. *Mervis Indus., Inc. v. PPG Indus., Inc.*, No. 1:09-cv-633-SEB-JMS, 2010 WL 1381671, at *1 (S.D. Ind. Mar. 30, 2010).

at one property and a warehouse, steel fabrication operation, and electronic equipment exchange operation at the other property. Mervis sold its two properties but continued to have contractual obligations concerning contamination of its properties.⁹⁸

Mervis sued PPG under various theories, including a RCRA open dumping claim, violations of the Clean Water Act (CWA), private nuisance, and other claims pursuant to RCRA, CERCLA, and Indiana's Environmental Legal Actions statute (ELA).⁹⁹ PPG counterclaimed under Sections 107(a) and 113(f) of CERCLA.¹⁰⁰ Mervis alleged that PPG's historic glassmaking operations caused arsenic contamination; PPG countered that Mervis's operations caused contamination of various metals and volatile organic compounds (VOCs).

In its order, the court addressed dueling motions to dismiss filed by both parties. PPG alleged that Mervis's open dumping, CWA, and nuisance claims must be dismissed.¹⁰¹ Mervis countered by alleging that PPG's CERCLA counterclaims did not state a recognizable claim.¹⁰²

RCRA prohibits "any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste."¹⁰³ The act explicitly limits this prohibition to "persons engaged in the act of dumping,"¹⁰⁴ therefore, in order to sustain a claim under this section, a party must allege that the defendant was engaged in the act of open dumping "at the time of filing."¹⁰⁵

PPG argued that Mervis's claim was barred because it did not allege current conduct.¹⁰⁶ Mervis countered that because unremediated waste continued to leach and migrate on the property, an open dumping claim could be sustained.¹⁰⁷ Relying on Second Circuit authority, the district court determined that "the mere presence of pollutants is not sufficient to allege an ongoing violation of the open dumping prohibition."¹⁰⁸ The court also rejected Mervis's argument that PPG's movement of soils (allegedly containing contaminants) also constituted introduction of contaminants for purposes of RCRA.¹⁰⁹ For these reasons, Mervis's open dumping claim was dismissed.¹¹⁰

98. *Id.*

99. *Id.*

100. 42 U.S.C. §§ 9607(a) (response costs); *id.* § 9613(f)(1) (contribution).

101. During the briefing, Mervis abandoned its private nuisance claims. For this reason, the court dismissed that count without discussion. *Mervis Indus., Inc.*, 2010 WL 1381671, at *5.

102. *Id.* at *2.

103. 42 U.S.C. § 6945(a).

104. *Id.*

105. *Mervis Indus., Inc.*, 2010 WL 1381671, at *3 (quoting *S. Rd. Assocs. v. Int'l Bus. Machs. Corp.*, 216 F.3d 251 (2d Cir. 2000)).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

The court also dismissed Mervis's claims for violation of the CWA.¹¹¹ Under the CWA, a party may be held liable for discharge of a pollutant made from a "point source."¹¹² A point source must be a "discernible, confined and discrete conveyance."¹¹³ Mervis argued that PPG's landfill of construction materials on the properties constituted a "point source."¹¹⁴ The court disagreed, finding that this "general statement that contaminants are now migrating or leaching . . . was not sufficient to state a claim under the CWA."¹¹⁵

Mervis moved to dismiss PPG's CERCLA § 107(a) counterclaim because Mervis did not own the two properties at issue at the time PPG disposed of the arsenic, and it argued that any response costs related to the arsenic were solely attributable to PPG.¹¹⁶ This argument was rejected, as the court noted that PPG alleged that other hazardous substances—that is, metals and VOCs—had been released by Mervis at the properties. Mervis's argument that PPG could not pursue a § 107(a) claim because it was a potentially responsible party (PRP) was summarily rejected.¹¹⁷

Finally Mervis argued that PPG's CERCLA § 113(f)(1) counterclaim must be dismissed because PPG had not been sued under § 106 or 107(a).¹¹⁸ However, Mervis's suit included a CERCLA § 107(a) claim, and on that basis, the district court permitted PPG's counterclaim under § 113.¹¹⁹

C. Both the Plaintiff and Defendants Are Liable Under CERCLA and the ELA: City of Gary v. Shafer

At the resolution of liability in *City of Gary v. Shafer*, the United States District Court for the Northern District of Indiana decreed that several defendants and the plaintiff, the City of Gary ("the City"), were liable for contamination at a former auto salvage site.¹²⁰ The site at the center of the suit was contaminated with lead, and the City filed suit against prior owners under CERCLA and ELA. The prior owners, Paul Shafer ("Shafer") and his company, Paul's Auto Yard,

111. *Id.* at *4 (citing 33 U.S.C. § 1311(a) (2006)).

112. *Id.* (citing 33 U.S.C. § 1362(12)).

113. 33 U.S.C. § 1362(14).

114. *Mervis Indus., Inc.*, 2010 WL 1381671, at *4.

115. *Id.*

116. *Id.* at *5.

117. *Id.* at *6 (citing *United States v. Atl. Research Corp.*, 551 U.S. 128, 131 (2007)).

118. Although the court's opinion is silent, it appears that Mervis was attempting to distinguish between the type of contaminant at issue. Because Mervis had only sued PPG on the basis of arsenic, it appears that Mervis was arguing that its § 107(a) claim could not create the basis for PPG's § 113(f)(1) counterclaim. Nevertheless, if this distinction was Mervis's argument, the court found it unpersuasive.

119. *Id.* (citing *Atl. Research Corp.*, 551 U.S. at 140 (noting that if a PRP sought to impose joint and several liability on another PRP, a "defendant PRP in such a 107(a) suit could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim.")).

120. 683 F. Supp. 2d 836, 864-65 (N.D. Ind. 2010).

Inc., filed counterclaims against the City and a subsequent owner, Waste Management.¹²¹ Prior to Shafer's ownership, his father had operated an auto salvage business for thirty years. Shafer continued the auto salvage business for another eleven years before selling the property to Waste Management.¹²² For two years after the sale of the property, Paul's Auto Yard wound up the business and removed the inventory of the salvage business from the site.¹²³ The City unsuccessfully argued that the lead contamination at the site was caused by leaking or damaged batteries at the salvage yard. The court focused instead on the movement of contaminated soil.¹²⁴

When Paul's Auto Yard cleaned up the site, dirt was moved as well. Even though the court found that the amount was *de minimis*, this was enough to be a "disposal" of hazardous materials and trigger liability under CERCLA because it "exacerbate[d] a pre-existing contamination on the property."¹²⁵ Knowledge of the contamination or the amount of soil moved was irrelevant for CERCLA liability, and the court therefore declared judgment on the issue of CERCLA liability against Paul's Auto Yard, but not Shafer as an individual, based on the company's minimal movement of contaminated soil when removing piles of tires.¹²⁶ This same activity also made Paul's Auto Yard liable under the ELA.¹²⁷ Paul's Auto Yard and Shafer attempted to prove CERCLA's innocent landowner defense; however, they were unable to show that the sole cause of the contamination was from another party (the City) or to demonstrate that they exercised due care concerning the lead contamination because they failed to investigate or remove hazardous substances likely released by Shafer's predecessor.¹²⁸

Paul's Auto Yard was not the only party found liable for the contamination; the court found that Waste Management and the City also contributed to the contamination.¹²⁹ Waste Management's liability stemmed from a similar activity as Paul's Auto Yard—the company had also moved contaminated soil around the property while removing auto parts and grading soil.¹³⁰

The City's liability under CERCLA and the ELA was tied to its operation of a municipal landfill adjacent to Paul's Auto Yard. The City "disposed" or "released" hazardous materials into the landfill, and lead-contaminated run-off traveled from the landfill onto the subject property.¹³¹ The court also found that

121. *Id.* at 840, 844.

122. *Id.* at 848.

123. *Id.* at 842-43.

124. *Id.* at 846-48, 855-56.

125. *Id.* at 853 (citing *Alcan-Toyo Am., Inc. v. N. Ill. Gas. Co.*, 881 F. Supp. 342, 346 (N.D. Ill. 1995)).

126. *Id.* at 857-58.

127. *See* IND. CODE §§ 13-30-9-1 to -8 (2011).

128. *Shafer*, 683 F. Supp. 2d at 858-60.

129. *Id.* at 860-62.

130. *Id.* at 849, 863-64.

131. *Id.* at 849-51, 861-62.

Paul's Auto Yard had incurred costs, as required to seek contribution from the City under CERCLA.¹³² Though the Seventh Circuit had not addressed the issue, the court reasoned that the declaratory judgment entered against Paul's Auto Yard meant that it would incur costs in the future.¹³³ The court entered declaratory judgment against the City on Paul's Auto Yard's claims brought under CERCLA and the ELA even though the defendants had not sought this type of relief.¹³⁴ The allocation of response costs and shares of liability will be handled at a separate proceeding.¹³⁵

D. Motor Vehicles Are Not "Facilities" Under CERCLA:
Emergency Services Billing Corp. v. Allstate Insurance Co.

In *Emergency Services Billing Corp. v. Allstate Insurance Co.*, the United States District Court for the Northern District of Indiana rejected the plaintiff's argument that motor vehicles are facilities under the meaning of CERCLA.¹³⁶ The plaintiff, Emergency Services Billing Corporation ("ESBC"), acted as the billing agent for a fire department that responded to several car accidents. These car accidents had the potential to release hazardous materials into the air, and the fire department's billing agents sent invoices for these removal services to the automobile owners and their insurers.¹³⁷ When the invoices remained unpaid, ESBC sought a declaratory judgment that it could recover amounts owed by the defendant insurance company pursuant to CERCLA.¹³⁸

After the defendants moved for judgment on the pleadings, the district court evaluated whether the motor vehicles in the accidents could be considered a "facility" under CERCLA, which was a required element of the plaintiff's private cost recovery action.¹³⁹

The court examined several definitions in determining whether the motor vehicles met the definition of "facility." The court noted that no court had "squarely addressed" this issue.¹⁴⁰ "Facility" is defined broadly under CERCLA,

132. *Id.* at 860-61 (citing 42 U.S.C. 9613(f) (2006)).

133. *Id.* at 861 (quoting *Basic Management, Inc. v. United States*, 569 F. Supp. 2d 1106, 1120 (D. Nev. 2008)).

134. *Id.* at 862. The court had the authority to enter declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. § 2201, and nothing in CERCLA's contribution framework precluded that remedy. *Id.* at 861-62 (citing *Appleton Papers, Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1046 (E.D. Wis. 2008)).

135. *Id.* at 864.

136. *Emergency Servs. Billing Corp. v. Allstate Ins. Co.*, No. 4:09-cv-45-RL-APR, 2010 U.S. Dist. LEXIS 26327, at *2 (N.D. Ind. Mar. 19, 2010).

137. *Id.* at *2-3.

138. *Id.* at *2.

139. *Id.* at *8-9 (citing *Env'tl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 506 (7th Cir. 1992) (listing elements plaintiff must establish for a private cost recovery action under CERCLA)).

140. *Id.* at *12 (citing William B. Johnson, Annotation, *What Constitutes "Facility" Within Meaning of § 101(9) of the Comprehensive Environmental Response, Compensation, and Liability*

and it includes “motor vehicle” but excludes “any consumer product in consumer use.”¹⁴¹ Due to the fact that “consumer product” is not defined in CERCLA, the court looked to *Amcast Industrial Corp. v. Detrex Corp.*,¹⁴² in which the Seventh Circuit Court of Appeals stated that the consumer products exception applied only to facilities that are in and of themselves consumer products, “not for consumer products contained in facilities.”¹⁴³ As a result, the trial court applied a two-part test: “(1) whether the object from which the leak/spill emanates is a facility defined by the statu[t]e; and (2) whether the object from which the leak/spill emanates is a ‘consumer product in consumer use.’”¹⁴⁴ The court focused on the second step, looking at definitions from *Black’s Law Dictionary*,¹⁴⁵ the Magnuson-Moss Warranty Act,¹⁴⁶ and the Consumer Product Safety Act.¹⁴⁷ *Black’s Law Dictionary* cited the definition from the Magnuson-Moss Warranty Act, which defined consumer product in part as “‘any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes.’”¹⁴⁸ The court determined that the vehicles in the accidents met this definition because they were personal property used for personal purposes.¹⁴⁹ The court rejected the definition by the plaintiff because the definition excluded motor vehicles,¹⁵⁰ and a finding that motor vehicles could never be consumer products under CERCLA “defies the plain language of CERCLA.”¹⁵¹ The purpose of the consumer products exception in CERCLA was intended to guard consumers from the “strict liability under CERCLA for a ‘release’ from a product in consumer use.”¹⁵² Interestingly, the U.S. EPA had adopted a rule regarding the meaning of “consumer product” that referred to the definition within the Consumer Product Safety Act, but did not include the motor vehicle exception or other exceptions to the definition found

Act (CERCLA) (42 U.S.C. § 9601(9)), 147 A.L.R. FED. 469 (1998)).

141. 42 U.S.C. § 9601(9) (2006).

142. *Emergency Servs. Billing Corp.*, 2010 U.S. Dist. LEXIS 26327, at *10-11 (citing *Amcast Indus. Corp. v. Detrex Corp.*, 2 F. 3d 746, 750 (7th Cir. 1993)).

143. *Id.* at *11 (quoting *Amcast Indus. Corp.*, 2 F.3d at 750).

144. *Id.* (citing *Amcast Indus. Corp.*, 2 F.3d at 746).

145. BLACK’S LAW DICTIONARY 359 (9th ed. 2009).

146. 15 U.S.C. § 2301(1).

147. *Id.* § 2052(a)(5).

148. *Emergency Servs. Billing Corp.*, 2010 U.S. Dist. LEXIS 26327, at *15 (quoting 15 U.S.C. § 2301(1)).

149. *Id.* at *17-18.

150. The definition offered by the plaintiffs for “consumer product” is found in the Consumer Product Safety Act, 15 U.S.C. § 2052(a)(5). This definition excludes motor vehicles. *Id.* § 2052(a)(5)(C).

151. *Emergency Servs. Billing Corp.*, 2010 U.S. Dist. LEXIS 26327, at *17.

152. *Id.* at *19-20 (citing Lewis Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 45 BUS. LAW. 923, 961-62 (1990)). The court also examined the legislative history of CERCLA. *Id.* at *20-21.

within that act.¹⁵³ At the end of its analysis, the court stated: “‘consumer product in consumer use’ refers to its ordinary meaning, which includes the private passenger motor vehicles specifically at issue in this case being used for personal purposes.”¹⁵⁴ The court later denied ESBC’s motion for reconsideration, standing by its reasoning in this opinion.¹⁵⁵

E. Applying Statutes of Limitation to Administratively Dissolved Companies and Addressing an “Open Question” from United States v. Atlantic Research Corp.: Bernstein v. Bankert

In *Bernstein v. Bankert*, the United States District Court for the Southern District of Indiana ruled that an administratively dissolved company’s insurers could not use the two-year protection within the Indiana Business Corporations Law (IBCL) to bar a suit to recover response costs brought by trustees of a trust fund for a Superfund site.¹⁵⁶ The defendant company, Enviro-Chem, was administratively dissolved on December 31, 1987, and the plaintiffs filed suit over twenty years later on April 1, 2008.¹⁵⁷ Contamination at the Third Site Trust Fund (“Third Site”) at issue in this case was linked to activities of defendant Enviro-Chem, and U.S. EPA filed a cost recovery action against Enviro-Chem for costs expended for clean-up near the Third Site in 1983.¹⁵⁸ U.S. EPA issued an administrative order for the Third Site on March 22, 1996. Even though over a decade passed after the first U.S. EPA order before suit was filed, that fact was not sufficient for Indiana’s corporate laws to protect Enviro-Chem.¹⁵⁹ The court reasoned that the two-year statute of limitation protection was afforded to voluntarily dissolved corporations, not administratively dissolved corporations “because no notice of its dissolution was given to its creditors.”¹⁶⁰ An administratively dissolved corporation formed under the IBCL is not permitted to carry on business, but it is permitted to conduct business “necessary to wind up and liquidate its business and affairs . . . and notify claimants.”¹⁶¹ The court examined (and quoted at length from) *United States v. SCA Services of Indiana, Inc.*, which also involved an administratively dissolved corporation that unsuccessfully tried to assert that the plaintiff’s case was time-barred.¹⁶² The court in *SCA Services* reasoned, “It would defy simple logic for this court to hold

153. *Id.* at *22 (citing Superfund, Emergency Planning, & Community Right-to-Know Programs, 40 C.F.R. § 302.3 (2011)).

154. *Id.* at *24.

155. *Emergency Servs. Billing Corp. v. Allstate Ins. Co.*, No. 4:09-cv-45-RL-APR, 2010 U.S. Dist. LEXIS 47673 (N.D. Ind. May 14, 2010).

156. 698 F. Supp. 2d 1042, 1052-53 (S.D. Ind. 2010).

157. *Id.* at 1048, 1050.

158. *Id.* at 1046, 1048-49.

159. *Id.* at 1053.

160. *Id.* at 1052.

161. *Id.* (citing IND. CODE § 23-1-46-2(c) (2011)).

162. 837 F. Supp. 946, 953 (N.D. Ind. 1993).

that . . . [the defendant], a corporation which can still be sued by its general business creditors, cannot be sued by a creditor proceeding under the federal CERCLA statute.”¹⁶³ The court in *Bankert* agreed with this reasoning and distinguished this case from those involving voluntarily dissolved corporations.¹⁶⁴

Several months later, the non-insurer defendants in *Bankert* received a favorable ruling on a summary judgment motion based on the statute of limitation within CERCLA.¹⁶⁵ A plaintiff has three years after the date of an administrative order or entry of a settlement to bring a contribution claim under § 113 of CERCLA.¹⁶⁶ A cost recovery action brought pursuant to § 107¹⁶⁷ has a longer statute of limitation period, depending on the nature of the activity for which the plaintiff is seeking recovery.¹⁶⁸ After examining *Cooper Industries, Inc. v. Aviall Services, Inc.*¹⁶⁹ and *United States v. Atlantic Research Corp.*,¹⁷⁰ the court determined that the plaintiffs did not “voluntarily” clean up the site because the work at the site was done under two separate consent orders issued by U.S. EPA.¹⁷¹ This meant that contribution claims were the plaintiffs’ available remedy under CERCLA.¹⁷²

The court then evaluated how to handle the “open question” from *Atlantic Research*—namely, how to treat plaintiffs who neither incur costs voluntarily nor reimburse the costs of another party.¹⁷³ The court looked to a recent opinion from another circuit, *Agere Systems, Inc. v. Advanced Environmental Technology Corp.*,¹⁷⁴ for analysis on this same issue. The court in *Agere Systems* studied additional language within *Atlantic Research* where the Supreme Court reasoned that a defendant in a § 107 cost recovery suit could “blunt any inequitable distribution of costs by filing a § 113(f) counterclaim.”¹⁷⁵ However, in *Agere Systems*, the plaintiffs had settled their liability with the U.S. EPA, and therefore,

163. *Bankert*, 698 F. Supp. 2d at 1052-53 (citing *SCA Servs.*, 837 F. Supp. at 953).

164. *Id.* at 1053.

165. *Bernstein v. Bankert*, No. 1:08-cv-0427-RLY-DML, 2010 WL 3893121 (S.D. Ind. Sept. 29, 2010).

166. 42 U.S.C. § 9613(g)(3)(B) (2006). The same limitations period applies if a contribution claim is brought after “the date of judgment in any action under this Act for recovery of such costs or damages.” *Id.* § 9613(g)(3)(A).

167. *Id.* § 9607.

168. A plaintiff has three years to bring a suit to recover costs for a removal action or six years to bring a suit to recover remedial action costs. *Id.* § 9613(g)(2). Remedial action is a “permanent remedy,” whereas a removal action addresses the immediate threats to the environment because of a release or threat of release of hazardous substances. *Id.* § 9606.

169. 543 U.S. 157 (2004).

170. 551 U.S. 128 (2007).

171. *Bankert*, 2010 WL 3893121, at *5.

172. *Id.* The consent orders issued by U.S. EPA in this case were properly characterized as “administrative settlements” under 42 U.S.C. 9613(g)(3)(B). *Id.*

173. *Id.* at *7 (citing *United States v. Atl. Research Corp.*, 551 U.S. 128, 139 n.6 (2007)).

174. 602 F.3d 204 (3d Cir. 2010).

175. *Id.* at 228 (quoting *Atl. Research Corp.*, 551 U.S. at 140).

the defendants could not bring a contribution counterclaim against them because of CERCLA's contribution bar within § 113(f)(2).¹⁷⁶ The plaintiffs in *Bankert* had entered into agreements that offered similar protections, and the court agreed with the reasoning in *Agere Systems* that allowing the plaintiffs to pursue a cost recovery action with the protection from contribution would allow them to recover all of their costs, even though they were also identified as responsible parties for the contamination at the Third Site.¹⁷⁷ Therefore, because the plaintiffs' claims could only be contribution claims, the CERCLA count of their complaint was time-barred.¹⁷⁸ More than three years had passed since the date of the U.S. EPA consent orders in 1999 and 2002.¹⁷⁹ The court also dismissed the plaintiffs' common law and ELA claims because the statutes of limitation had run for these claims.¹⁸⁰

III. DEVELOPMENTS IN THE LAW RELATED TO WATER RIGHTS

In the survey period, two opinions issued by the United States Supreme Court involved water rights disputes. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, four members of the Court held that state court judicial decisions could be prohibited takings if a court declares that a previously held right no longer exists.¹⁸¹ In *South Carolina v. North Carolina*, the Supreme Court rejected South Carolina's attempt to shut out private riparian users from intervening in its border dispute with North Carolina.¹⁸² Finally, the U.S. EPA's stormwater construction rule and other water related decisions warrant a brief discussion.

A. Recognition of the Concept of Judicial Taking with Regard to Riparian Rights: Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection

A plurality of the United States Supreme Court,¹⁸³ purporting to redefine the

176. *Id.* CERCLA's contribution bar states, "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2).

177. *Bankert*, 2010 WL 3893121, at *8 (citing *Agere Sys.*, 602 F.3d at 228-29).

178. *Id.* at *9.

179. *Id.*

180. *Id.* at *9-10. The EPA issued an administrative order by consent for this site in 1996, which was the first date the plaintiffs' predecessors in interest had been ordered to clean up the property, which meant that the plaintiff had ten years from the enactment of the ELA to file suit. *Id.* at *10.

181. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2602 (2010).

182. *South Carolina v. North Carolina*, 130 S. Ct. 854, 865-66 (2010).

183. Justice Stevens did not participate because he owns a beachfront condo in Florida. See *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, ENDANGERED ENVTL. LAWS, http://www.endangeredlaws.org/case_beach_protection.htm (last

application of the Takings Clause of the Fifth Amendment to the United States Constitution, recently concluded that a decision by a state court of last resort may constitute a “taking” of private property without just compensation.¹⁸⁴ In *Stop the Beach Renourishment*, two Florida cities sought to deposit new sand along the shoreline of the beaches eroded by hurricanes, thereby extending the beaches into the sea by seventy-five feet.¹⁸⁵ A group of property owners challenged these actions, arguing that the actions violated the Takings Clause of the U.S. Constitution because they deprived the owners of their exclusive access to the water as well as ownership of any new land subsequently added by gradual natural change.¹⁸⁶ The Florida Supreme Court rejected that argument, relying in part on the doctrine of avulsion, which permits a state to reclaim a restored beach on behalf of the public.¹⁸⁷

The Court unanimously held that the Florida Supreme Court, by upholding Florida’s decision to restore an eroded beach by filling in submerged land owned by the state, did not engage in an unconstitutional taking of beachfront property owners’ property rights.¹⁸⁸ The Court reasoned that under Florida law,¹⁸⁹ the property owners did not have any right to the filled-in land.¹⁹⁰ Instead, the state had the right to fill in its own seabed, and any previously submerged land that is exposed by a sudden event belongs to the state—even if the state causes the exposure and disrupts the property owner’s contact with the water.¹⁹¹ Indeed, the Court held that there could be no “taking” unless the petitioner could “show that, before the Florida Supreme Court’s decision, littoral-property owners had rights to future accretions and contact with the water superior to the State’s right to fill in its submerged land.”¹⁹²

However, Justice Scalia, joined by Justices Thomas and Alito and Chief Justice Roberts, went further and declared that future state court judicial decisions—as opposed to actions by state executive or legislative entities—could be prohibited takings if “a court declares that what was once an established right

visited Aug. 13, 2011).

184. *Stop the Beach Renourishment*, 130 S. Ct. at 2602. Generally, state law defines property interests, including property rights in navigable waters and the lands underneath them. *Id.* at 2597 (citations omitted).

185. *Id.* at 2600.

186. *Id.*

187. *Id.* (citation omitted).

188. *Id.* at 2602.

189. Florida law provided that “the State owns in trust for the public the land permanently submerged beneath navigable waters and the foreshore (the land between the low-tide line and the mean high-water line).” *Id.* at 2598 (citing FLA. CONST. art. X, § 11; *Broward v. Mabry*, 50 So. 826, 829-30 (Fla. 1909)). “[T]he mean high-water line (the average reach of high tide over the preceding 19 years) is the ordinary boundary between private beachfront, or littoral property, and state-owned land.” *Id.* at 2598 (citations omitted).

190. *Id.* at 2598-2611.

191. *Id.* at 2600.

192. *Id.* at 2611.

of private property no longer exists.”¹⁹³ The plurality reasoned that the Takings Clause is concerned with the act of taking property, rather than with the branch of government that does the taking.¹⁹⁴ Justice Scalia further opined that the Takings Clause “applies as fully to the taking of a landowner’s riparian rights as it does to the taking of an estate in land.”¹⁹⁵ The remainder of the Justices¹⁹⁶ concurred in the judgment but filed opinions either criticizing the plurality for expressing “views” not called for by the facts of the case or disagreeing with the notion of a judicial taking, or both.¹⁹⁷ In particular, Justices Sotomayor, Kennedy, Ginsburg, and Breyer emphasized in their respective opinions that because the Florida Supreme Court’s decision did not constitute a taking, there was no reason to resolve the broader question of whether a judicial decision could ever constitute a taking.¹⁹⁸

B. The Expansion of Intervention Rights to Private Water Users in Interstate Water Litigation: South Carolina v. North Carolina

In a 5-4 decision, the United States Supreme Court opened the door in its *South Carolina v. North Carolina*¹⁹⁹ opinion for private water users to intervene in interstate water rights disputes. In that case, the state of South Carolina filed a complaint alleging that North Carolina had authorized upstream water transfers from the Catawba River that exceeded North Carolina’s equitable share of the river.²⁰⁰ South Carolina claimed that the net effect of these transfers was to deprive South Carolina of its equitable share of the Catawba River’s water.²⁰¹ As such, South Carolina sought to have the Court equitably apportion the Catawba River between the two states and to declare that North Carolina’s permitting statute was invalid to the extent it authorized use of the river that exceeded North Carolina’s equitable share.²⁰²

Shortly after South Carolina filed its complaint, entities permitted by North Carolina, the Catawba River Water Supply Project (CRWSP), Duke Energy Carolinas, LLC (“Duke”), and the City of Charlotte, North Carolina (“Charlotte”) moved to intervene in the dispute as parties.²⁰³ CRWSP argued that it should be allowed to intervene because the existing parties did not adequately represent its

193. *Id.* at 2602.

194. *Id.*

195. *Id.* at 2601.

196. Justices Sotomayor, Kennedy, Ginsburg, and Breyer were the remaining Justices.

197. *Stop the Beach Renourishment*, 130 S. Ct. at 2613-19.

198. *Id.* at 2613-14, 2618-19.

199. 130 S. Ct. 854 (2010).

200. *Id.* at 859-60.

201. *Id.* at 859.

202. *Id.*

203. *Id.* at 860. Both CRWSP and Duke were specifically referenced in South Carolina’s complaint. *Id.*

interests as a riparian user that was owned and operated in both states.²⁰⁴ Similarly, Duke argued that it should be allowed to intervene in the lawsuit because it operated eleven dams and reservoirs on the river that controlled the river's flow, it held a fifty-year license from the Federal Energy Regulatory Commission (FERC), and it orchestrated the multi-stakeholder negotiation process that resulted in a re-licensing agreement signed by entities from both states.²⁰⁵ Finally, Charlotte argued that it should be allowed to intervene in the lawsuit because it held the largest transfer authorization for the Catawba River granted by North Carolina.²⁰⁶

The Court rejected South Carolina's efforts to prevent CRWSP and Duke from actively participating in the Catawba River dispute with North Carolina.²⁰⁷ The Court acknowledged that an intervenor must show some compelling interest "in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state" for intervention to be proper.²⁰⁸ The Court found that both CRWSP and Duke met this burden.²⁰⁹ In particular, the Court noted that North Carolina had specifically admitted that it could not represent the full scope of CRWSP's interests and that neither state had sufficient interest in representing the full scope of CRWSP's interest, as CRWSP serviced areas in both jurisdictions.²¹⁰ The Court further noted that there was no other similarly situated entity on the Catawba River like Duke because Duke used the river's water to provide electricity to the region.²¹¹ Duke also had an interest in protecting its FERC license, which regulated "the very subject matter in dispute: the river's minimum flow into South Carolina."²¹²

The Court, however, did agree that Charlotte should not be allowed to intervene because the city's interests were already fairly represented by a party to the litigation—North Carolina.²¹³ In this regard, the Court noted that Charlotte, as a North Carolina municipality, received its ability to transfer water from the Catawba River from North Carolina.²¹⁴ No relief was requested by Charlotte. Moreover, Charlotte's interests fell squarely within the category of interests to which a State, as *parens patriae*, must be deemed to represent on behalf of all of its citizens—i.e., ensuring an equitable share of an interstate river's water.²¹⁵ Thus, the Court held that Charlotte could not show a compelling interest in its own right, apart from its interest as a permittee of North Carolina, and

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 865-66.

208. *Id.* at 863 (citing *New Jersey v. New York*, 345 U.S. 369, 373 (1953)).

209. *Id.* at 864, 866.

210. *Id.* at 864-65.

211. *Id.* at 866-67.

212. *Id.* at 866.

213. *Id.* at 867.

214. *Id.*

215. *Id.* at 868.

intervention was not proper.²¹⁶

*C. U.S. EPA's Stormwater Construction Rule: An
Uncertain Enforcement State*

In December 2009, U.S. EPA issued its final construction stormwater effluent guidelines rule (the “Rule”), which established a numeric limit on the turbidity of stormwater discharges from large construction sites and required monitoring to ensure compliance with the numeric limit.²¹⁷ The Rule also required nearly all construction sites that obtained stormwater permits after February 1, 2010 to implement a range of erosion and sediment controls and pollution prevention measures.²¹⁸ U.S. EPA’s Rule elicited a lawsuit by industry groups in the Seventh Circuit: *Wisconsin Builders Ass’n v. EPA*.²¹⁹ The petitioners raised a variety of challenges to the Rule, including that U.S. EPA had promulgated a flawed numeric turbidity limit.

In response to objections from industry groups, U.S. EPA conceded that the Rule’s controversial numeric turbidity limit was flawed. Consequently, in August 2010, U.S. EPA filed an unopposed motion requesting that the court vacate the numeric turbidity limit, remand that part of the Rule to the agency, and hold the suit in abeyance until February 15, 2012 to give U.S. EPA time to reevaluate the Rule’s numeric limit.²²⁰ The Seventh Circuit granted U.S. EPA’s request to remand the Rule and to hold the suit in abeyance but refused to vacate the numeric turbidity limit.²²¹ Since the admittedly flawed turbidity limit remains an enforceable component of the Rule, the Seventh Circuit’s decision has essentially left various states in an awkward position of having to decide how to accommodate a numeric turbidity limit that will be subject to suit while U.S. EPA goes through the potentially time-consuming administrative process of revising its Rule.²²² As such, it is uncertain what, if any, enforcement action will actually

216. *Id.* at 867-68.

217. *See* Effluent Guidelines and Standards, 40 C.F.R. § 450 (2011).

218. *See generally id.*

219. *See* Complaint, *Wis. Builders Ass’n v. EPA*, No. 09-4113 (7th Cir. Dec. 28, 2008). The Seventh Circuit consolidated various petitions for review of the Rule filed by organizations that included the Wisconsin Builders Association and the National Association of Home Builders into one case. *See, e.g.,* Order, *Utility Water Act Grp., Nos. 09-4113, 10-1247, 10-1876* (7th Cir. Sept. 20, 2010).

220. EPA’s Unopposed Motion for Partial Vacatur of the Final Rule, Remand of the Record, to Vacate Briefing Schedule, and to Hold the Case in Abeyance, *Wis. Builders Ass’n v. EPA*, No. 09-4113 (7th Cir. Aug. 13, 2010).

221. Order Re: Petitioners’ Unopposed Motion for Clarification or Reconsideration of the Aug. 24, 2010 Order, No. 09-4113 (7th Cir. Sept. 20, 2010).

222. U.S. EPA retains authority to mandate technology-based performance criteria for point source categories as well as new source performance standards (NSPS). *See* 33 U.S.C. § 1314 (2006). Furthermore, U.S. EPA’s national regulations set a floor for technology-based effluent limits in NPDES permits, although states may set more stringent limitations to protect water

occur with regard to this Rule.

D. Other Water-Related Decisions

In *United States v. Ritz*,²²³ the United States District Court for the Southern District of Indiana held that the Cottonwood Campground, which was run by the defendants (collectively, “the Campground”) had violated the Safe Drinking Water Act (SDWA) by failing to properly test its water for coliform and nitrate.²²⁴ In that case, the Campground had between fifty and eighty campsites, each of which had a water spigot and a sewer hookup for use by campers.²²⁵ The water spigots were marked “non-potable.”²²⁶ However, the Campground argued that it should not be considered a public water system (PWS) required to test its water system because the Campground did not have a minimum of twenty-five individuals daily or at least fifteen service connections in use at least sixty days of the year.²²⁷ In rejecting this argument, the court stated that because the Campground contained at least fifty water spigots, it was a PWS subject to the SDWA, and this PWS designation did not require that the spigots be used on a regular basis or by a certain number of people.²²⁸ Consequently, the court held that the Campground was in violation of the SDWA because the campground’s water samples tested positive for total coliform.²²⁹

In the past year, the United States District Court for the Northern District of Indiana issued an instructional opinion in *Stillwater of Crown Point Homeowner’s Ass’n, Inc. v. Kovich*²³⁰ regarding the standard for obtaining a default judgment against a party when multiple defendants are involved. In *Kovich*, a heavy rainstorm caused a ditch running through two subdivisions to overflow, causing damage to various common areas and homes within the subdivisions.²³¹ The homeowners filed suit against the three developers of the subdivisions, the individual partners of the land developer, and the City of Crown Point, Indiana, alleging a violation of the CWA, nuisance, negligence, and other claims.²³² All the defendants, except developer Stillwater Properties, answered the plaintiffs’ complaint.²³³ The plaintiffs moved for default judgment against

quality. *Id.* As such, any rule promulgated by U.S. EPA with regard to its permit requirements must trickle down to the states that implement these discharge programs.

223. *United States v. Ritz*, No. 1:07-cv-1167-WTL-DML, 2010 U.S. Dist. LEXIS 87851 (S.D. Ind. Aug. 25, 2010).

224. *Id.* at *1, *3-4.

225. *Id.* at *3.

226. *Id.*

227. *Id.* at *5; 42 U.S.C. § 300f(4)(A) (2006).

228. *Ritz*, 2010 U.S. Dist. LEXIS, at *6-7.

229. *Id.* at *9.

230. No. 2:09-CV-157-PPS-PRC, 2010 WL 1541188 (N.D. Ind. Apr. 15, 2010).

231. *Id.* at *1.

232. *Id.*

233. *Id.*

Stillwater Properties.²³⁴ The court rejected the plaintiff's motion for default judgment because

[e]ach of the claims against Stillwater is asserted against nondefaulting defendants as well, who may, in the course of defending against the claims, demonstrate that no liability properly lies on one or more of the various causes of actions, or that the amount of damages is other than claimed in the motion for default judgment. This possibility mitigates against a default judgment against Stillwater Properties—at least at this point in time. This is because such an entry may ultimately be inconsistent with the adjudication of the same claim on the merits against the nondefaulting defendants.²³⁵

The court further explained that where default judgment has not been sought from all defendants, entry of default judgment prior to adjudication of the merits on the case is improper when the “nature of the relief is such that [it] is necessary that judgments against the defendants be consistent.”²³⁶ The court pointed out that entry of default judgment was also not proper because the plaintiffs' claims against the defendant did not carry liability that was joint or joint and several.²³⁷ Thus, the court noted that the plaintiffs could pursue a default judgment against Stillwater after the case against the nondefaulting defendants was resolved.²³⁸

IV. ENVIRONMENTAL CASES UNDER STATE LAW

During the survey period, the Seventh Circuit Court of Appeals issued a lengthy opinion affirming in almost all respects the well-known legal principle that a trial judge has broad discretion in determining the amount of attorneys' fees and costs, in this particular instance under Indiana's Underground Storage Tank Act (USTA). The Indiana Court of Appeals also issued a decision that an environmental negligence claim was not barred by the economic loss doctrine.

A. *Wickens v. Shell Oil Co.*

The *Wickens v. Shell Oil Co.* litigation has been the subject of multiple court opinions, survey articles, and other commentary.²³⁹ As the Seventh Circuit noted at the outset of its opinion, “there is not much left of it at this point.”²⁴⁰ This opinion addressed cross-appeals of the district court's award of attorneys' fees and costs following a settlement of liability issues. While the facts may be very familiar to many readers, we will briefly state facts important to this opinion.

234. *Id.*

235. *Id.* at *2.

236. *Id.* (citation omitted).

237. *Id.* at *3.

238. *Id.* at *3-4.

239. See, e.g., Freedom S.N. Smith et al., 2007-2008 *Environmental Law Survey: A System in Flux*, 42 IND. L. REV. 973, 1000 (2009) (discussing trial court's opinion on fees).

240. *Wickens v. Shell Oil Co.*, 620 F.3d 747, 750 (7th Cir. 2010).

In 2004, as the Wickenses prepared to retire from its shoe store business, they discovered that the store rested on a bed of contaminated soil.²⁴¹ Their property had been used as a Shell gas station prior to their ownership. The Wickenses retained Mark Shere as their attorney and began negotiating with Shell regarding the contamination.²⁴² Dissatisfied with those negotiations, the Wickenses filed suit alleging that Shell was responsible under Indiana's USTA.²⁴³

At the outset of the investigation, the Wickenses hired a consultant, HydroTech, to conduct an investigation at the site.²⁴⁴ Through that investigation, HydroTech concluded that a neighboring property ("Gardner Property") was also contaminated. The Gardner Property had been affiliated with a different oil company, but HydroTech concluded that the contamination on the Gardner Property likely originated from Shell's tanks on the Wickenses' property.²⁴⁵ Shell, of course, strenuously disagreed with this conclusion, and a bitter fight ensued.

Both parties began submitting competing environmental assessments to the Indiana Department of Environmental Management (IDEM), causing IDEM to decide that as of November 2006, it would deal exclusively with the Wickenses for both properties.²⁴⁶ Moreover, the district court denied Shell's motion for summary judgment, finding that Shell in all likelihood bore full responsibility for the contamination.²⁴⁷ Following these developments, settlement talks accelerated, but the parties were unable to reach settlement on their own. On January 9, 2007, the district court entered an order "temporarily freezing the parties' liability for each other's attorneys' and experts' fees."²⁴⁸ The Wickenses challenged the order, but the court declined, and the parties were eventually able to reach a settlement agreement. The parties could not resolve the calculation of corrective action costs and attorneys' fees but agreed that the Wickenses were entitled to some award.²⁴⁹ The district court received evidence and, using a date of January 9, 2007, entered an order awarding the Wickenses \$391,307.83 in attorneys' fees and \$116,511.27 in corrective action costs.²⁵⁰

After the district court entered its order, the Wickenses' attorney revealed for the first time that the litigation had been funded in part by Employers Fire Insurance Company ("Employers").²⁵¹ Shell moved to vacate the court's order, which the court denied. Both parties then appealed the court's order on costs and

241. *Id.*

242. *Id.*

243. IND. CODE § 13-23-13-8 (2011).

244. *Wickens*, 620 F.3d at 750.

245. *Id.* at 750-51.

246. *Id.* at 751.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 752.

251. *Id.*

fees, and Shell appealed the denial of its Rule 60(b) motion to vacate.²⁵²

On appeal, Shere argued that the court should not have used a cut-off date at all.²⁵³ In the alternative, Shere argued that a later date should have been used, and Shell argued for three earlier dates in the litigation.²⁵⁴ Shere also contended that the court should have awarded prejudgment interest on his attorneys' fee award, whereas Shell argued that the whole decision should be revisited based on Shere's misrepresentation regarding who was paying his fees.²⁵⁵

The Seventh Circuit Court of Appeals first considered whether the district court had properly used the "statutory-purpose test" instead of simply awarding Shere fees without regard to a cut-off date.²⁵⁶ Shere argued that he had obtained significant victories for his client after the court-imposed cut-off date; therefore, the imposition of a cut-off date would short-change him for such efforts.²⁵⁷ The court affirmed the use of the cut-off date because "fees may not be awarded on the basis of non-Act claims."²⁵⁸

Both parties then argued about what date should be used for the cut-off date. Shell suggested three earlier dates, and Shere argued for a later date.²⁵⁹ The appellate court found that Shell's arguments for an earlier date were unpersuasive. As to the first date, Shell argued that it had offered to clean up the Wickenses' property at that time.²⁶⁰ The court noted that the Wickens (and IDEM) believed that Shell was responsible for both properties, so Shell's offer did not fully resolve the Wickenses' USTA claim. The court expressly rejected Shell's argument that the USTA did not require it to clean up another person's property.²⁶¹ Because the Wickenses "had a right under the Act to hold Shell liable for the full extent of the corrective action costs they owed," the district court's rejection of the January 2005 date was proper.²⁶²

Shell next argued that the court should have used its August 2006 date because it submitted a further site investigation plan to IDEM at that time. But

252. *Id.* Shell also moved to modify the judgment because Shere had submitted invoices for his wife, Colleen Shere, whose law license had lapsed before this litigation ensued. *Id.* The opinion addresses the detail of that calculation, and Shere's objection to those fees, but for our purposes, we will simply note that the trial court's decision against awarding such fees was affirmed. *Id.*

253. *Id.*

254. *Id.* at 754.

255. *Id.* Shere also argued that the district court's findings that were critical of his professionalism and candor should be stricken. The Seventh Circuit gave short shrift to such arguments, reminding counsel that it sits "to review judgments, not particular language in district court opinions," and that the overall award was largely favorable to him. *Id.* at 759.

256. *Id.* at 753.

257. *Id.*

258. *Id.*

259. *Id.* at 754.

260. *Id.*

261. *Id.* (citing IND. CODE § 13-23-13-8(b) (2011)).

262. *Id.* at 754-55.

this argument suffered similar fallacies, as Shell was still contending at that time that contamination on the Wickenses' property was not attributable to Shell, but the other company's tanks from the Gardner Property. Because Shell had not promised to cover the Wickenses' corrective action costs by August 2006, this date was also properly rejected by the district court.²⁶³

Shell's final proposed cut-off date was November 21, 2006, the day it offered "to pay 100% of the past and future corrective action costs at the Wickens[es]' property, to indemnify the Wickens[es] and any future owners or tenants of the property against these costs . . . and to pay reasonable costs of litigation as determined by the [c]ourt."²⁶⁴ While this offer seemed to resolve the issues on liability, negotiations over attorneys' fees were routine, so the district court's decision to award Shere fees from November to January was not overturned.²⁶⁵ Furthermore, Shell had an opportunity to accept a settlement number based on the magistrate judge's proposal, and therefore, Shell was responsible for the continuation of the litigation.²⁶⁶ While a fee award must be reasonable, "counsel may legitimately hold out for a better deal (for at least some time) because fee litigation is costly and often is not reimbursed as part of the fee award."²⁶⁷

Shere argued that the court's January 2007 cut-off was too early and that the district court's "time-out" order conflicted with the fee-shifting provisions of the USTA.²⁶⁸ For reasons similar to the court's rejection of Shell's November 2006 proposed cut-off date, this argument failed. Just as the district court was allowed to award fees for a period of time after Shell indicated it would accept full responsibility for liability, the court was permitted to "force an end" to the litigation over fees.²⁶⁹ The appellate court found that Judge Barker was "generous" in only restricting fees for ninety days; furthermore, Shere's "overblown reaction" to the time-out order was evidence that Shere was "unnecessarily expanding the scope of the IDEM investigation."²⁷⁰

Shere also argued that the district court erred by not awarding prejudgment interest on the attorneys' fees and costs.²⁷¹ Under Indiana law, prejudgment interest may be awarded where damages are "ascertainable in accordance with fixed rules of evidence and accepted standards of valuation at the time the damages accrued."²⁷² Where the damages are subject to a "good faith dispute," prejudgment interest need not be awarded.²⁷³ Shere argued that under *Shell v.*

263. *Id.* at 755.

264. *Id.*

265. *Id.* at 756.

266. *Id.*

267. *Id.* at 755.

268. *Id.* at 755-56.

269. *Id.* at 756.

270. *Id.*

271. *Id.*

272. *Id.* at 757-58 (citation omitted).

273. *Id.* at 758 (quoting *Whited v. Whited*, 859 N.E.2d 657, 665 (Ind. 2007)).

Meyer,²⁷⁴ prejudgment interest was appropriate to compensate for the delay in payment. The Seventh Circuit found that while *Meyer* did award prejudgment interest on attorneys' fees in a disputed USTA claim, *Meyer* did not indicate that such an award is mandatory.²⁷⁵ Furthermore, the calculation of attorneys' fees in *Meyer* did not involve the contentious arguments regarding when to begin calculating such fees and costs; thus, it was not error for the district court to refuse Shere's request for prejudgment interest.²⁷⁶

Finally, Shell argued that the district court erred by denying its motion to vacate based on Shere's failure to disclose the fact that an insurer was partially funding the Wickenses' litigation.²⁷⁷ Under Federal Rule of Civil Procedure Rule 26, litigants must "automatically disclose 'any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.'"²⁷⁸ The Seventh Circuit affirmed the district court's conclusion that the rule required disclosure of Employers' involvement as an insurer funding the litigation.²⁷⁹ But the court declined to find error in the lower court's denial of the motion to vacate.²⁸⁰ While Shell argued that it "would have reached a different settlement if it knew about Employers's 'deep pockets,'" the court reasoned that these same deep pockets could have caused Shell to offer a bigger settlement in this case, where Shell had already lost on its summary judgment motion.²⁸¹

*B. Economic Loss Doctrine Does Not Bar Environmental Negligence Claim:
KB Home Indiana, Inc. v. Rockville TBD Corp.*

This case pitted a property developer against an airplane parts manufacturer.²⁸² KB Home Indiana, Inc. ("KB"), a developer, sought to recover under theories of negligence, nuisance, and trespass for contamination on land it acquired from a third party, allegedly emanating from Rockville TBD Corp.'s ("Rockville's") former site.²⁸³ The court of appeals reversed the trial court's determination that the economic loss doctrine did not allow KB to pursue its negligence claims against Rockville, where the developer did not purchase the land (or any property or product) from Rockville.²⁸⁴ However, the court affirmed the trial court's entry of summary judgment for Rockville on KB's trespass and nuisance claims, as the contaminating activities had ceased before the property

274. 684 N.E.2d 504, 526-27 (Ind. Ct. App. 1997).

275. *Wickens*, 620 F.3d at 758 (citing *Meyer*, 684 N.E.2d at 526-27).

276. *Id.*

277. *Id.*

278. *Id.* at 759 (citing FED. R. CIV. P. 26(a)(1)(A)(iv)).

279. *Id.*

280. *Id.*

281. *Id.*

282. *KB Home Ind., Inc. v. Rockville TBD Corp.*, 928 N.E.2d 297, 299 (Ind. Ct. App. 2010).

283. *Id.*

284. *Id.* at 304-05.

was purchased by the developer.²⁸⁵

V. DEVELOPMENTS IN INDIANA ENVIRONMENTAL INSURANCE LAW

In this section, we examine recent opinions that may impact environmental insurance coverage cases under Indiana law. Several cases had the potential to make a paradigm-shifting change in Indiana insurance law. For example, the Indiana Court of Appeals indicated a willingness to adopt a “site-specific” approach to interpreting choice of law in insurance policies for multi-state environmental suits.²⁸⁶ Nevertheless, this opinion was vacated after the survey period concluded, but before the survey article was published.²⁸⁷ Therefore, Indiana remains committed to the uniform-contract-interpretation method that has been followed for a number of years.²⁸⁸ Likewise, most of the other decisions in this year’s survey period were logical extensions of prior precedent.

A. Actual Controversy Existed over Insurance Policy Without Formal Claim or Strict Compliance with Proof of Loss Provision: ESI Environmental, Inc. v. American International Specialty Lines Insurance Co.

In *ESI Environmental, Inc. v. American International Specialty Lines Insurance Co.*, a used oil processing company sought declaratory judgments in separate actions against two of its insurers.²⁸⁹ The insurers provided coverage for oil contamination that occurred at ESI Environmental, Inc.’s (“ESI’s”) property.²⁹⁰ One of those insurers, National Union, argued that the court did not have subject matter jurisdiction over the dispute and that ESI’s complaint should be dismissed under Federal Rule of Civil Procedure Rule 12(b)(6) for failure to state a claim upon which relief can be granted.²⁹¹ In this case, one of ESI’s customers discovered large amounts of polychlorinated biphenyls (“PCBs”) in oil that it shipped to ESI for processing.²⁹² The oil had been certified as PCB-free, and ESI was not notified until after it had already processed the oil. Because the PCBs mixed with and cross-contaminated ESI’s equipment and other oil, ESI’s capacity to process oil had been compromised. ESI alleged that National Union

285. *Id.* at 308-09.

286. *See Nat’l Union Fire Ins. Co. v. Standard Fusee Corp.*, 917 N.E.2d 170, 179 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, 940 N.E.2d 810 (Ind. 2010).

287. *See Standard Fusee Corp.*, 940 N.E.2d 810, *reh’g denied*.

288. *See id.* at 815-16.

289. *ESI Env’tl., Inc. v. Am. Int’l Specialty Lines Ins. Co.*, No. 1:07-cv-1182-LJM-DML, 2010 WL 582215, at *1 (S.D. Ind. Feb. 10, 2010).

290. *Id.*

291. *Id.* at *5. The court interpreted the parties’ briefs under Federal Rule of Civil Procedure Rule 12(b)(6) to request a ruling on the merits of National Union’s affirmative defenses relating to written notice and proof of loss requirements. The court rejected this request and determined that the complaint sufficiently pleaded a claim for declaratory relief that was plausible on its face. *Id.* at *7.

292. *Id.* at *1.

breached its contract of insurance and that the contract of insurance provided coverage for the contamination event.²⁹³ National Union argued that both claims were not ripe, or alternatively, that ESI had not properly pleaded either claim.²⁹⁴

First, the court considered whether “an actual controversy” existed “of sufficient immediacy and reality to warrant issuance of a declaratory judgment.”²⁹⁵ National Union argued that ESI’s claim was not ripe because ESI had not filed a formal claim and proof of loss with National Union.²⁹⁶ The court noted that the parties had an “actual controversy” because ESI had made several attempts to notify National Union of ESI’s claim. National Union’s arguments that “strict compliance with an insurance contract’s notice provisions” was not required to have an actual controversy under the act.²⁹⁷

However, the court found that ESI’s breach of contract claim was not ripe because National Union had never actually denied coverage.²⁹⁸ The court reasoned that in order to have a justiciable claim for breach of contract, National Union must have made a decision to “deny coverage;” therefore, there was no live controversy between the parties.²⁹⁹ ESI’s claim for declaratory judgment was a live controversy, and that portion of the case was permitted to proceed.³⁰⁰

B. Notice After Decades of Discussion and Investigation Precludes Coverage:
P.R. Mallory & Co. v. American Casualty Co.

In the late 1940s, Radio Materials Corporation began operating a factory in Attica, Indiana that manufactured picture tubes and other television parts.³⁰¹ P.R. Mallory and Company (“P.R. Mallory”) purchased Radio Materials stock in 1957.³⁰² From 1950 until 1980, waste from these operations was disposed in two open unlined pits located at the plant site (“the Site”). As early as May 1969, the Indiana State Board of Health was involved with the Site regarding contamination flowing from these pits.³⁰³ In 1980 and 1986, Radio Materials sent notices to U.S. EPA regarding its waste activity and potential releases from the unlined pits.

The court of appeals considered whether P.R. Mallory’s notice to two of its insurers (American Casualty Company (“ACC”) and Continental Casualty

293. *Id.* at *1-2.

294. *Id.* at *6.

295. *Id.* (citation omitted).

296. *Id.*

297. *Id.* at *7.

298. *Id.*

299. *Id.*

300. *Id.*

301. *P.R. Mallory & Co. v. Am. Cas. Co.*, 920 N.E.2d 736, 739 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 795 (Ind. 2010).

302. *Id.* Plaintiffs in this suit included P.R. Mallory & Company, Inc., Radio Materials Corporation, Kraft Foods Global, Inc., and Dart & Kraft Inc. *Id.* For purposes of this discussion, “P.R. Mallory” is used to describe all plaintiffs.

303. *Id.* at 739.

Company ("CCC") (collectively, "the Insurers")) was sufficient to sustain coverage for releases from the unlined pits near the Attica facility.³⁰⁴ For the reasons stated below, the Indiana Court of Appeals found that P.R. Mallory's notice was insufficient and coverage was barred by the policies' notice provisions.³⁰⁵

P.R. Mallory argued that notice was not late under the policies because "no notice requirement was triggered because an occurrence had not yet occurred."³⁰⁶ From P.R. Mallory's perspective, taken together, "the . . . [p]olicies require notice only when the insured becomes aware of 'an accident . . . resulting in . . . physical injury to . . . tangible property' during the policy period."³⁰⁷ For this reason, P.R. Mallory argued that unless it became subjectively aware of such property damage taking place by ACC and CCC from 1980 to 1984 (the period insured), P.R. Mallory was not required to give notice to the Insurers.³⁰⁸ The Insurers argued that the question turned on whether it had "any knowledge of an accident" between 1980 and 2000, which triggered the notice provision under the policy.³⁰⁹

The court of appeals affirmed summary judgment for the Insurers.³¹⁰ In addition to the notices provided to U.S. EPA in 1980 and 1986, the Insurers designated numerous communications and activities by P.R. Mallory in support of late notice.³¹¹ In particular, minutes from a 1989 board of directors meeting revealed discussions of notifying third parties of the potential liabilities emanating from the unlined pits.³¹² Later that same year, the general counsel sent a letter stating that "potential environmental pollution problems exist at the plant site in Attica, Indiana."³¹³ In 1991, another meeting was held regarding "potential environmental liability" and directing the company to consult legal counsel for advice.³¹⁴

Moreover, P.R. Mallory hired environmental consultants to perform investigation and site characterization.³¹⁵ These reports demonstrated the presence of excessive amounts of contaminants at the property. After this investigation, an excavation project was initiated on the property, but this clean-

304. *Id.* at 739-40.

305. *Id.* at 754.

306. *Id.* at 749.

307. *Id.* at 750.

308. *Id.*

309. *Id.* (citation omitted).

310. *Id.* at 754.

311. *Id.* at 753. The court of appeals first refused to consider some evidence cited by Radio Materials on appeal because it had failed to properly designate the evidence in response to ACC and CCC's motions for summary judgment. *Id.* at 754. The court of appeals reminded counsel of its obligations to separately designate its evidence on summary judgment and to limit its arguments to evidence properly designated. *Id.* at 755.

312. *Id.* at 740.

313. *Id.* (citation omitted).

314. *Id.* at 741.

315. *Id.* at 752.

up was conducted improperly.³¹⁶ Thereafter, in 1999, P.R. Mallory entered into a consent order with the U.S. EPA in which the agency found that “there had been a release of hazardous waste” at the facility.³¹⁷ For all of these reasons, the court concluded that P.R. Mallory had knowledge of an occurrence before it notified ACC and CCC and that the delay constituted unreasonably late notice under the policy.³¹⁸

The court also found that the late notice in this case prejudiced the Insurers. Based on another court of appeals decision, the court presumed that late notice was prejudicial to ACC and CCC.³¹⁹ Furthermore, the Insurers’ reliance on other grounds to deny coverage did not preclude the late notice defense.³²⁰

P.R. Mallory argued that the insurers were not actually prejudiced by the notice. It argued that the Insurers’ experts had praised the investigatory work performed by P.R. Mallory’s expert.³²¹ But the court disagreed, finding that commentary on environmental work performed after the notice was given was not relevant to whether prejudice existed in the notice’s delay.³²² The court also found that P.R. Mallory had not rebutted the Insurers’ assertions that potential witnesses had died and were unable to participate in the defense and investigation prior to the notice.³²³

Judge Najam concurred in result but disagreed with the determination that late notice was the dispositive issue.³²⁴ Rather, he agreed with P.R. Mallory’s argument that the notice provision was not triggered until after P.R. Mallory knew of an occurrence.³²⁵ However, he opined that P.R. Mallory had failed to prove any occurrence during the policy period, and therefore, summary judgment on coverage was appropriate.³²⁶ He suggested that there was “no evidence regarding when or for how long the contamination had migrated off-site, and there is no evidence of actual third-party property damage . . . [during the policy period].”³²⁷ Judge Najam criticized P.R. Mallory’s citation to suits by neighboring third-party plaintiffs as evidence.³²⁸ Because such complaints were not attached in opposition to the summary judgment motion, Judge Najam found

316. *Id.*

317. *Id.* at 752-53.

318. *Id.* at 753.

319. *Id.* at 754 (citing *Tri-etch, Inc. v. Cincinnati Ins. Co.*, 891 N.E.2d 563 (Ind. Ct. App. 2008)).

320. *Id.*

321. *Id.* at 755.

322. *Id.* at 755-56.

323. *Id.* at 756.

324. *Id.* (Najam, J., concurring).

325. *Id.* at 757.

326. *Id.* at 758.

327. *Id.*

328. *Id.* Coincidentally, at least one such suit against P.R. Mallory’s successor, Kraft, is discussed herein. *See* discussion *supra* Part II.A (discussing *Stoll v. Kraft Foods Global, Inc.*, No. 1:09-CV-0364-TWP-DML, 2010 WL 3702359 (S.D. Ind. Sept. 6, 2010)).

that no showing of a duty to defend or occurrence could be made by P.R. Mallory.³²⁹

*C. One Insurer Uses Modified Pollution Exclusion Against Another Insurer:
West Bend Mutual Insurance Co. v. U.S. Fidelity & Guaranty Co.*

In *West Bend Mutual Insurance Co. v. U.S. Fidelity & Guaranty Co.*, the Seventh Circuit Court of Appeals affirmed summary judgment for an insurer on a pollution exclusion in an environmental case.³³⁰ In this case, two insurers—West Bend and Federated—were litigating whether one insurer should reimburse the other for costs paid during a class action against MDK, their mutual insured.³³¹ MDK, a corporation, owned a gas station and stored gasoline in underground storage tanks. In September 1996, MDK notified IDEM that a leak had occurred from these tanks. Following that leak, neighboring parcels filed a class action lawsuit against the gas station.³³² MDK properly tendered the case to its insurers, and West Bend provided a defense, which was subject to a reservation of rights.³³³ Federated received a similar request but declined coverage on the grounds of a pollution exclusion (among other defenses).³³⁴ West Bend paid \$4 million to settle the class action.³³⁵

This opinion dealt with subsequent litigation by West Bend alleging that Federated should have participated in the defense and settlement of the class action. Federated's policy contained a pollution exclusion that excluded "[b]odily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants."³³⁶ The pollution exclusion specifically mentioned "motor fuels" in the exclusion and defined motor fuels as "petroleum or a petroleum-based substance that is typically used in the operation of a motor or engine."³³⁷ Federated's definition of "pollutants" did not specifically include "gasoline."³³⁸ The policy also included an endorsement stating that the pollution exclusion "applies whether or not such irritant or contaminant has any function in your business, operations, premises, site or location."³³⁹

The Seventh Circuit Court of Appeals considered the Indiana Supreme Court's decision in *American States Ins. Co. v. Kiger*.³⁴⁰ The definition of

329. *P.R. Mallory*, 920 N.E.2d at 758 (Najam, J., concurring).

330. *W. Bend Mut. Ins. Co. v. U.S. Fid. & Guar. Co.*, 598 F.3d 918, 926 (7th Cir. 2010).

331. *Id.* at 919-20.

332. *Id.* at 920.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* (citation omitted).

337. *Id.* at 921.

338. *Id.*

339. *Id.*

340. 662 N.E.2d 945 (Ind. 1996).

pollutants was identical in both the American States policy at issue there and in the Federated policy in this litigation.³⁴¹ But the American States policy made no mention of “motor fuels or gasoline” anywhere in the policy.³⁴² According to the majority in *West Bend*, *Kiger* focused on “whether American States adequately identified gasoline as an uncovered pollutant.”³⁴³ The majority concluded that the Indiana Supreme Court “determined that the policy did not resolve . . . [the] ambiguity [regarding gasoline] and proceeded to interpret it against the defendant drafter and in favor of coverage.”³⁴⁴

West Bend argued that because the policy did not mention gasoline or motor fuels in the definitions in the policy, the policy did not explicitly exclude claims related to gasoline. This argument was unpersuasive to the majority, who held that “[t]he plain language . . . [of the pollution exclusion] explains that Federated will not cover property damage or personal injuries related to gasoline.”³⁴⁵ The court stated that the insured (who was presumed by Indiana law to have read the policy) “would know to a certainty that Federated would not be responsible for damage arising out of gasoline leaks.”³⁴⁶ The majority distinguished three other Indiana cases on the pollution exclusion because the policies in those cases also did not mention “specific substances” in their pollution exclusions.³⁴⁷

The majority also considered whether the excess liability coverage in the policy provided coverage, even in the face of the court’s conclusion on the pollution exclusion. The excess coverage defined pollutants differently from the underlying coverage, and this definition was “identical to the one in *Kiger*.”³⁴⁸ For coverage to exist, the policy’s products-completed operations coverage needed to apply. The majority concluded that “as a matter of Indiana law, the products hazard clause [in this policy] . . . cannot reach accidental spills.”³⁴⁹ The supreme court’s decision in that case was based on distinct policy language that was not present in the instant policy.³⁵⁰ Because the underlying class action at issue in this case was predicated on an accidental leak of gasoline, there was no coverage under the excess policy’s coverage for products-completed operations.³⁵¹

341. *W. Bend Mut. Ins. Co.*, 598 F.3d at 922 (citing *Kiger*, 622 N.E.2d at 949).

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.* at 923.

346. *Id.*

347. *Id.* at 923-24 (citing *Nat’l Union Fire Ins. Co. v. Standard Fusee Corp.*, 917 N.E.2d 170, 179 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, 940 N.E.2d 810 (Ind. 2010); *Friedline v. Shelby Ins. Co.*, 774 N.E.2d 37 (Ind. 2002); *Travelers Indemnity Co. v. Summit Corp.*, 715 N.E.2d 926 (Ind. Ct. App. 1999)).

348. *Id.* at 925.

349. *Id.* (citation omitted).

350. *See id.* at 922 (citing *Kiger*, 622 N.E.2d at 949).

351. *Id.*

Judge Sykes dissented from the majority's holding.³⁵² While she agreed with the interpretation of the underlying policy, she disagreed that coverage did not exist through the products-completed operation coverage in the excess policy. She noted that the policy covered "any goods or products . . . sold . . . by [MDK] . . . and . . . containers . . . furnished in connection with such goods or products."³⁵³ Judge Sykes would have found against the insurer on this policy because the loss stemmed from bodily injury or property damage "arising out of MDK's 'product'—that is, its gasoline—which was not in MDK's possession at the time of the loss."³⁵⁴ Judge Sykes noted that *B & R Farm Services* dealt with an exclusion, but the language in this policy was in a coverage-granting provision.³⁵⁵ This distinction required reading the coverage-grant "broadly in favor of coverage" rather than "more narrowly" like an exclusion would be read.³⁵⁶ Judge Sykes also noted additional limiting language in *B & R Farm Services* that was not present in the instant policy.³⁵⁷ Finally, Judge Sykes disagreed with "engraft[ing] the limitations applicable to the 'completed operations' hazard onto the 'products' hazard."³⁵⁸ She viewed the majority's decision as a "fairly significant *extension*" of *B & R Farm Services*, when there was no clear indication in that case that the Indiana Supreme Court so intended that result.³⁵⁹ Because she found a disputed issue on whether the loss was known by MDK, she would have remanded for further proceedings to resolve that question.³⁶⁰

D. Indiana Retains Uniform Contract Interpretation Approach for Deciding Choice of Law: National Union Fire Insurance Co. v. Standard Fusee

Since the publication of the last survey article, three opinions have been issued regarding issues of choice of law in environmental insurance cases. Two of those opinions were decided in appeals in the *Standard Fusee* litigation, but the Indiana Supreme Court's opinion was issued after the survey period concluded.³⁶¹ Thus, while the court of appeals decision would have represented

352. *Id.* at 926 (Sykes, J., dissenting).

353. *Id.* at 927.

354. *Id.*

355. *Id.* (citing *B&R Farm Servs., Inc. v. Farm Bureau Mut. Ins. Co.*, 483 N.E.2d 1076, 1077 (Ind. 1985)).

356. *Id.*

357. *Id.*

358. *Id.* at 928 n.1.

359. *Id.* at 929 n.2.

360. *Id.* at 929-30.

361. The third opinion on this topic is *Pulse Engineering, Inc. v. Travelers Indemnity Co.*, 679 F. Supp. 2d 969 (S.D. Ind. 2009). In this case, Judge McKinney followed the court of appeals decision in *Standard Fusee* before the supreme court's opinion on transfer had been issued. *Id.* at 973 (citing *Nat'l Union Fire Ins. Co. v. Standard Fusee Corp.*, 917 N.E.2d 170, 179 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, 940 N.E.2d 810 (Ind. 2010)).

a dramatic shift in the approach for evaluating choice of law, the supreme court has since concluded that the traditional “uniform-contract-interpretation” approach “is more consistent with Indiana’s choice-of-law jurisprudence” and “should apply in cases involving multisite, multistate insurance policies.”³⁶² Because the court of appeals decision has been vacated, we will preview next year’s article, which will more fully explore the supreme court’s reasoning in this case.

Standard Fusee Corporation (“Standard Fusee”) manufactures emergency signaling flares.³⁶³ It is incorporated in Delaware and headquartered in Maryland, and in 1988, Standard Fusee owned one facility in Maryland, two in Pennsylvania, one in New Jersey, and one in Ohio.³⁶⁴ That year, Standard Fusee began leasing facilities in both Indiana and California. Over the years, Standard Fusee bought and sold various properties, and at the time of the opinion, Standard Fusee had operations in Maryland, Indiana, and Pennsylvania.³⁶⁵

Standard Fusee purchased the policies at issue through two brokers, one located in Maryland and one in Massachusetts.³⁶⁶ The insurance negotiations were completed through Standard Fusee’s Maryland headquarters.³⁶⁷ The policies did not specify the law of the state that would govern their interpretation.³⁶⁸

In 2002, Standard Fusee was informed that perchlorate, a chemical used in the production of flares, had been discovered in groundwater samples near its California facility.³⁶⁹ Thereafter, numerous lawsuits were filed in California, but ultimately, they were dismissed because it was determined that Standard Fusee had never discharged perchlorate at that facility.³⁷⁰ Thereafter, Standard Fusee voluntarily tested its Indiana facility.³⁷¹ As a result of that test, Standard Fusee applied for, and was granted, inclusion in the Indiana Department of Environmental Management’s Voluntary Remediation Program (VRP) the following year.

Standard Fusee requested defense and indemnification from its insurers with respect to the proceedings in California and Indiana.³⁷² After the insurers refused, Standard Fusee filed this case against the insurers seeking a declaratory judgment that the insurers must defend and indemnify Standard Fusee against the environmental liabilities arising in Indiana and California.³⁷³ After the trial court

362. *Standard Fusee Corp.*, 940 N.E.2d at 813.

363. *Id.* at 811.

364. *Id.*

365. *Id.*

366. *Id.* at 811-12.

367. *Id.* at 812.

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

granted partial summary judgment on these grounds, the insurers appealed.³⁷⁴

The court of appeals acknowledged that Indiana courts have traditionally followed Restatement (Second) of Conflict of Laws when confronted with a choice of law issue.³⁷⁵ The Restatement uses a multi-factor test to decide a choice of law issue.³⁷⁶ With regard to contract cases, “[t]he rights and duties of the parties . . . are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties.”³⁷⁷ Under the “uniform-contract-interpretation” approach the court would determine the most significant relationship by considering: “(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.”³⁷⁸ Despite the prior precedent, the court of appeals reasoned that Indiana courts “did not explicitly reject the site-specific approach” that some states have applied to multi-state contract cases.³⁷⁹ The court reasoned that if it applied a site-specific approach, “the parties [will] know in advance which law will apply, the insurer can quantify its risk, the insured will know it has coverage, and the court need not concern itself with the [Restatement’s] . . . factors in order to choose a single state’s law.”³⁸⁰ Therefore, the court of appeals concluded that Indiana law should apply to Standard Fusee’s Indiana site, California law would apply to its California sites, and Maryland law would apply for the insurance policy on the Maryland site.³⁸¹

The court of appeals decision accomplished the rare feat of unifying two parties involved in active litigation. Both Standard Fusee and National Union sought transfer with the supreme court, and both parties argued that the court of appeals decision to implement a “site-specific” approach was wrongly decided, with Standard Fusee arguing for uniform application of Indiana law, and the insurers arguing for Maryland law.³⁸² The Indiana Supreme Court vacated the court of appeals decision and reaffirmed the “uniform-contract-interpretation” approach that “has been an integral part of . . . [Indiana’s] choice-of-law analysis in contract cases for two-thirds of a century.”³⁸³

Using that approach, the Indiana Supreme Court found that the state with the

374. *Id.*

375. *Nat’l Union Fire Ins. Co. v. Standard Fusee Corp.*, 917 N.E.2d 170, 176 (Ind. Ct. App. 2009) (citing *Utopia Coach Corp. v. Weatherwax*, 379 N.E.2d 518 (Ind. Ct. App. 1978)), *trans. granted, opinion vacated*, 940 N.E.2d 810 (Ind. 2010).

376. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (2010)).

377. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6).

378. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6).

379. *Id.* at 178.

380. *Id.*

381. *Id.* at 181.

382. *Nat’l Union Fire Ins. Co. v. Standard Fusee Corp.*, 940 N.E.2d 810, 811 (Ind. 2010).

383. *Id.* at 815.

intimate contacts was Maryland.³⁸⁴ While previous cases involved one state with more insured sites than any other, in this case, both Maryland and Indiana had one site each. But because Maryland was Standard Fusee's headquarters, this factor favored the insurers' position.³⁸⁵ Furthermore, Standard Fusee was a Delaware corporation headquartered in Maryland; the insurers were not incorporated or headquartered in either Maryland or Indiana.³⁸⁶ Next, all of the insurance was retained in, and the premiums were paid from, Maryland—a factor that also favored Maryland.³⁸⁷ Finally, while the trial court had determined that the "place of performance of the contract" was Indiana, counsel for Standard Fusee had apparently conceded in argument before the supreme court that "a large amount of its claim arose . . . in California," so the court found that "the place of performance is not exclusively Indiana."³⁸⁸ So while none of the factors were determinative, the Indiana Supreme Court held that "the substantive law of Maryland applies to the entire dispute."³⁸⁹

Interestingly, the court of appeals decision covered two issues that are once again undecided based on the supreme court's grant of transfer. The court of appeals had held that the absolute pollution exclusions in the insurers' policies were unenforceable under Indiana law, and Standard Fusee's participation in the VRP was a "suit" for purposes of determining the insurers' duty to defend.³⁹⁰ But given that the supreme court decided that Maryland law applied to this dispute, it "express[ed] no opinion beyond that set forth in this decision on these . . . issues."³⁹¹ Given the "no opinion" footnote, the court neither expressly adopted, nor summarily affirmed the court of appeals's findings; thus, these two holdings are no longer controlling law in Indiana.³⁹²

E. Self-Serving Affidavit Sufficient to Defeat Insurer Summary Judgment on Duty to Defend: Indiana Farmers Mutual Insurance Co. v. North Vernon Drop Forge, Inc.

This declaratory judgment action was filed by a commercial general liability insurer.³⁹³ The action arose after North Vernon Drop Forge, Inc. ("NVDF") sought an insured defense from Indiana Farmers Mutual Insurance Company

384. *Id.* at 817.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Nat'l Union Fire Ins. Co. v. Standard Fusee Corp.*, 917 N.E.2d 170, 185-86 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, 940 N.E.2d 810 (Ind. 2010).

391. *Standard Fusee Corp.*, 940 N.E.2d at 812 n.1.

392. *See* IND. APP. R. 58(A).

393. *Ind. Farmers Mut. Ins. Co. v. N. Vernon Drop Forge, Inc.*, 917 N.E.2d 1258, 1262 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 796 (Ind. 2010).

("IFMI") against claims brought against NVDF and its employees.³⁹⁴ The claim alleged that NVDF deposited contaminated fill dirt on the property of an auction operation to improve its parking area.³⁹⁵ The owner of the auction operation accused NVDF of depositing fill material containing contaminated industrial waste on its property and brought various claims, including a claim for negligence.³⁹⁶

IFMI denied coverage and initiated the declaratory judgment action, seeking a declaration that it had no duty to defend or indemnify NVDF. Both parties moved for summary judgment, with NVDF submitting an affidavit from its principal stating that he was unaware the fill materials were contaminated when they were provided.³⁹⁷ The trial court denied IFMI's motion to strike the affidavit, denied summary judgment to IFMI, and granted summary judgment to NVDF, ordering IFMI to both defend and indemnify NVDF.³⁹⁸

The court of appeals held that extrinsic evidence could be considered to determine an insurer's duty to defend, particularly where an insured submits an affidavit "denying intent and favoring coverage."³⁹⁹ The court of appeals thus considered the affidavit in connection with the underlying complaint in determining IFMI's duty to defend. The court of appeals also relied on *Harvey* in finding that there was an "occurrence" implicating the duty to defend in that "[t]he unintended consequence of an intentional act may qualify as an 'occurrence' for insurance purposes."⁴⁰⁰ Because NVDF did not intend to contaminate the auction property when depositing the fill material on the land, and because the complaint alleged (at least in part) unintentional conduct by NVDF in the form of negligence, the court of appeals held that evidence demonstrated an "occurrence" triggering IFMI's duty to defend NVDF. Utilizing the same reasoning, the court of appeals found that the "expected or intended" exclusion was inapplicable.⁴⁰¹

The court also found that late notice was no bar to coverage because the evidence of the insured's conduct in safeguarding the insurer's interest and defending the claims was sufficient to rebut any presumption of prejudice as a matter of law.⁴⁰² Finally, the court of appeals held that the trial court's ruling that there was a duty to indemnify was premature, and such duty could not be ascertained until the underling litigation was concluded.⁴⁰³

394. *Id.* at 1262-63.

395. *Id.* at 1264.

396. *Id.* at 1265.

397. *Id.* at 1265-66.

398. *Id.* at 1266.

399. *Id.* at 1268-69 (citing *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1291 (Ind. 2006)).

400. *Id.* at 1271 (citing *Harvey*, 842 N.E.2d at 1291).

401. *Id.* at 1273.

402. *Id.* at 1276.

403. *Id.*

CONCLUSION

Court decisions during the survey period illustrate that environmental law continues to be an emerging practice area.⁴⁰⁴ Indiana's state and federal courts were not left out of this phenomenon. Hopefully, our survey of these decisions will provide practitioners with a quick reference guide to the most significant decisions of this period and some insight into the issues that will be decided in the years to come.

404. *Occupational Outlook Handbook, 2010-11 Edition*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/oco/ocos053.htm> (last modified June 7, 2011) ("Job growth among lawyers also will result from increasing demand for legal services in such areas as . . . environmental law.").

RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

OCTOBER 1, 2009 – SEPTEMBER 30, 2010

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INTRODUCTION

The Indiana Rules of Evidence (the “Rules”) went into effect in 1994. Since that time, court decisions and statutory changes have continued to refine the Rules. This Article explains the developments in Indiana evidence law during the period from October 1, 2009 through September 30, 2010.¹ The discussion topics track the order of the Rules.

I. GENERAL PROVISIONS (RULES 101-106)

A. General—Rule 101

Pursuant to Rule 101(a), the Rules apply to all court proceedings in Indiana except when “otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court.”² The same rule provides that common law and statutory law apply to specific issues not covered by the Rules.³

Judge Robert L. Miller, Jr. of the U.S. District Court for the Northern District of Indiana succinctly summarized the preliminary issues and questions affecting admissibility of evidence as follows:

- Is it covered by a Rule of Evidence? If not (but only if not), is it covered by a statute or by pre-Rule case law?
- Is it a preliminary issue of fact to be decided by the judge rather than the factfinder and therefore not governed by the Rules (except those concerning privilege)?
- If in a sentencing hearing (which is not generally governed by the Rules), is the evidence against the accused reliable and therefore consistent with principles of due process?⁴

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1. The Indiana Supreme Court granted transfer in the following cases, which have been excluded from this article for that reason. *See* Konopasek v. State, 934 N.E.2d 762 (Ind. Ct. App. 2010), *aff’d in part and vacated in part*, 946 N.E.2d 23 (Ind. 2011); *In re* C.G., 933 N.E.2d 494 (Ind. Ct. App. 2010), *trans. granted*.

2. IND. R. EVID. 101(a).

3. *Id.*

4. *See* ROBERT L. MILLER, JR., INDIANA PRACTICE SERIES: COURTROOM HANDBOOK ON INDIANA EVIDENCE 5 (2010).

B. Situations in Which Use of Evidentiary Rules Is Limited—Rule 101

In probation and community corrections placement revocation hearings, “judges may consider any relevant evidence bearing some substantial indicia of reliability.”⁵ In *Mogg v. State*,⁶ Mogg challenged the admissibility of scientific evidence in her probation revocation hearing. As a condition of her probation, Mogg was banned from consuming alcohol and was required to wear a secure continuous remote alcohol monitor (SCRAM II) bracelet.⁷ Noting that “expert scientific testimony in probation revocation hearings is not subject to . . . Rule 702(b),”⁸ the Indiana Court of Appeals nonetheless reaffirmed the principle that

like any evidence in probation revocation hearings, [expert scientific testimony] is admissible only upon some showing of reliability. . . . As in a criminal trial, the reliability of expert scientific evidence may be established by judicial notice or a sufficient foundation to persuade the trial court that the relevant scientific principles are reliable.⁹

Although Rule 702(b) does not apply to probation revocation hearings, the court of appeals held that “the caselaw regarding Rule 702(b) and the factors articulated in *Daubert* are helpful to Indiana courts in determining whether expert scientific testimony in probation revocation hearings possesses substantial indicia of reliability and is therefore properly admissible.”¹⁰ With these principles in mind, the trial court was found to have considered the proper factors when it held that the scientific evidence regarding the SCRAM II system had sufficient indicia of reliability and that Mogg violated the terms of her probation.¹¹

Rule 101(c)(2) provides that the Rules do not apply in proceedings relating to sentencing, probation, or parole.¹² Consequently, in probation community corrections hearings, a judge may consider “any relevant evidence bearing some substantial indicia of reliability,” which may include “reliable hearsay.”¹³ In *Holmes v. State*, for example, the court of appeals found that the trial court had not abused its discretion in admitting the defendant’s urinalysis report during a

5. *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999); *see also* IND. R. EVID. 101(c)(2).

6. 918 N.E.2d 750 (Ind. Ct. App. 2009).

7. *Id.* at 752-53.

8. *Id.* at 756.

9. *Id.* (citing *Malinski v. State*, 794 N.E.2d 1071, 1084 (Ind. 2003)).

10. *Id.*

11. *Id.* at 758. The *Mogg* court limited its holding to probation hearings only, stating, “Our conclusion in this regard is not to be read for the proposition that SCRAM data are admissible in any type of proceeding or for purposes other than to prove the subject consumed alcohol.” *Id.* (citing *Steward v. State*, 652 N.E.2d 490, 498 (Ind. 1995)).

12. IND. R. EVID. 101(c)(2). Likewise, as noted in *Kalwitz v. Kalwitz*, 934 N.E.2d 741, 751 (Ind. Ct. App. 2010), Rule 101(c)(2) provides that the Indiana Rules of Evidence do not apply in small claims proceedings. *See* IND. SMALL CLAIMS R. 8(A).

13. *Holmes v. State*, 923 N.E.2d 479, 482 (Ind. Ct. App. 2010) (citing *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999)).

factfinding hearing at which the court concluded that Holmes had violated the terms of his home detention.¹⁴ The urinalysis report contained assurances from the laboratory that prepared it; these assurances provided that the report was prepared in accordance with the lab's standard operating procedures and "all applicable requirements."¹⁵

In *Malenchik v. State*,¹⁶ the Indiana Supreme Court held that the trial court did not err in considering, for sentencing purposes, the results of two assessments conducted by a county probation department: the Level of Service Inventory-Revised (LSI-R), used to predict the likelihood of an offender's recidivism, and the Substance Abuse Subtle Screening Inventory (SASSI), used to aid in identifying offenders with a high probability of having a substance abuse disorder.¹⁷ The defendant and amici argued that the results of these assessment tools should not be admissible because they lacked the scientific reliability required by Rule 702.¹⁸ The court explained that Rule 702 does not apply at sentencing hearings but noted that due process considerations nevertheless compel trial courts to disregard unreliable evidence in making sentencing decisions.¹⁹ The court concluded that both the SASSI and LSI-R were sufficiently reliable and that the trial court had not erred in considering their results.²⁰

In *Figures v. State*,²¹ the conditions of Figures's probation required that he not commit a criminal offense.²² Figures appealed the Marion Superior Court's revocation of his probation and order that he serve the entirety of his previously suspended sentence. The trial court based its revocation decision on its finding that Figures failed to report as directed to the probation department or to complete any community service work, and that there was probable cause that he committed a criminal act.²³ Figures argued that the trial court erred in admitting, over his objection on the grounds of insufficient reliability, the case chronology and probable cause affidavit from his domestic battery case.²⁴ The Indiana Court of Appeals held that the trial court properly admitted the certified docket (case chronology) because it had sufficient indicia of reliability in that it was an item "of public record which, pursuant to . . . Rule 803(8), would be admissible as [an] exception[] to the hearsay rule at a proceeding where the rules of evidence are

14. *Id.* at 484-85.

15. *Id.* at 484 (citation omitted).

16. 928 N.E.2d 564 (Ind. 2010).

17. *Id.* at 570-72.

18. *Id.* at 573.

19. *Id.* at 574 (citing ROBERT L. MILLER JR., 12 INDIANA PRACTICE SERIES, INDIANA EVIDENCE § 101.304 (3d ed. 2007)).

20. *Id.* at 575.

21. 920 N.E.2d 267 (Ind. Ct. App. 2010).

22. *Id.* at 269.

23. *Id.* at 270-71.

24. *Id.* at 271.

applicable.”²⁵ On the other hand, the court agreed with Figures’s argument that the trial court erred in admitting the probable cause affidavit because the State did not lay a foundation to establish its admissibility, and the case that the probable cause affidavit supported had been dismissed on the State’s own motion due to “[e]videntiary [p]roblems.”²⁶ Even with the exclusion of the probable cause affidavit, the court of appeals affirmed the trial court’s decision due to the sufficiency of the evidence. The admission of the probable cause affidavit was found to be harmless error.²⁷

C. Formal Offer of Proof—Rule 103

In *Simpson v. State*,²⁸ Simpson appealed his conviction for class A felony voluntary manslaughter and class D felony criminal recklessness, in part asserting that the trial court erred when it denied his request to recall one of the State’s witnesses—one of Simpson’s fellow inmates, Brian Gates.²⁹ On cross-examination, Gates testified, among other things, that he was not testifying against Simpson to obtain a lighter sentence, but “because . . . [it was] the right thing to do.”³⁰ Two days after Gates’s testimony at trial, but while the trial was still in progress, “Simpson’s counsel learned that Gates had written a letter to the trial court requesting [a] sentence modification or early release based on concerns for his safety.”³¹ After a bench conference, the trial court decided not to allow the introduction of the Gates letter into evidence; however, the judge did inform the jury that “Gates ‘did have on record with this [c]ourt, unrelated to his testimony here, a pending letter requesting that he be housed elsewhere or released early’ based on ‘[s]afety concerns unrelated to this case.’”³² The court noted, “To reverse a trial court’s decision to exclude evidence, there must have been error by the court that affected the defendant’s substantial rights *and* the defendant must have made an offer of proof or the evidence must have been clear from the context.”³³ Simpson failed to make a formal offer of proof in accordance with Rule 103 during the trial.³⁴ Nonetheless, the Indiana Court of Appeals did not find Simpson to have waived the issue on appeal due to the completeness of the

25. *Id.* at 271-72 (quoting *Pitman v. State*, 749 N.E.2d 557, 560 (Ind. Ct. App. 2001); *see also* *Hernandez v. State*, 716 N.E.2d 601, 602 (Ind. Ct. App. 1999) (noting that “substantial indicia of reliability . . . may be inferred where the evidence falls within a firmly rooted exception to the hearsay rule”).

26. *Figures*, 920 N.E.2d at 272.

27. *Id.* at 272-74.

28. 915 N.E.2d 511 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 781 (Ind. 2010).

29. *Id.* at 517.

30. *Id.* at 515.

31. *Id.* at 515-16.

32. *Id.* at 517 (citation omitted).

33. *Id.* (quoting *Woods v. State*, 892 N.E.2d 637, 641-42 (Ind. 2008)).

34. *See* IND. R. EVID. 103(a)(2).

record from the bench conference.³⁵ The court held that although “the better practice would have been to allow Simpson to call Gates as a witness . . . [the court could not] conclude that the trial court prejudiced Simpson’s substantial rights by not allowing him to recall Gates to the stand.”³⁶ In affirming Simpson’s conviction, the court went on to state that “[a]lthough the refusal to admit the letter as an exhibit was probably error,” it was a harmless error because “the trial court accurately described Gates’s letter to the jury.”³⁷

In *Bishop v. Housing Authority of South Bend*,³⁸ Bishop alleged that the trial court erred when it refused to order that her incarcerated child, Derek, be transported from prison to testify at Bishop’s immediate possession hearing.³⁹ On March 27, 2003, Bishop had entered into a lease agreement with the Housing Authority of South Bend (“HASB”) to rent an apartment at the Laurel Court complex for herself and her nine listed children, one of whom was Derek. The lease included a provision advising Bishop of HASB’s zero-tolerance policy for criminal activity.⁴⁰ Nevertheless, on July 18, 2008, Derek committed an armed robbery; thus, on August 1, 2008, HASB began proceedings to evict Bishop and her children.⁴¹ Bishop and HASB introduced conflicting evidence on the issue of whether or not Derek actually lived at Bishop’s HASB-leased residence.⁴² The trial court held that it was “‘more likely than not true’ that Derek was a resident of the unit” in its order for eviction and immediate preliminary possession.⁴³ Affirming the trial court’s order, the Indiana Court of Appeals noted that Bishop failed to make an offer of proof of Derek’s anticipated testimony in accordance with Rule 103(a)(2) and thus waived the issue on appeal. The court further held that even if the issue had not been waived, there was “no abuse of discretion in the trial court’s refusal to order Derek’s presence at the immediate possession hearing.”⁴⁴

In *Carter v. State*,⁴⁵ the Indiana Court of Appeals noted that under Rule 103(a)(2), a trial court’s error may not be predicated on a ruling excluding evidence unless the party attempting to admit the evidence made its substance known to the court through a proper offer of proof or the substance “was apparent from the context within which questions were asked.”⁴⁶ Carter, who was convicted by the trial court of Class D felony theft and Class B felony robbery for

35. *Simpson*, 915 N.E.2d at 518.

36. *Id.*

37. *Id.*

38. 920 N.E.2d 772 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 819 (Ind. 2010), *cert. denied*, 131 S. Ct. 1022 (2011).

39. *Id.* at 780.

40. *Id.* at 775.

41. *Id.* at 776.

42. *Id.* at 777-78.

43. *Id.* at 778 (citation omitted).

44. *Id.* at 780-81.

45. 932 N.E.2d 1284 (Ind. Ct. App. 2010).

46. *Id.* at 1287 (quoting IND. R. EVID. 103(a)(2)).

stealing liquor from a Wal-Mart store and punching a Wal-Mart loss prevention officer who pursued him from the store, argued on appeal that the lower court erred in refusing to admit evidence of the store's loss prevention policy.⁴⁷ Carter conceded that he made no offer of proof at trial, but he contended that the substance of the evidence was made clear by the cross-examinations of two Wal-Mart loss prevention officers, including Carter's alleged victim.⁴⁸

The court of appeals disagreed, noting that the trial court had ruled the policy irrelevant before trial and that when the State objected to a defense question that alluded to the policy, the defense failed to indicate why evidence regarding the policy had become relevant.⁴⁹ Thus, the defense had waived the issue for appellate review. Further, the court held that even if Carter had not waived the issue, he failed to demonstrate on appeal how the evidence of the policy bore relevance to whether he committed the criminal offenses of which he stood convicted.⁵⁰

D. The Rule of Completeness—Rule 106

In *Barnett v. State*,⁵¹ Barnett appealed his convictions for two counts of child molesting as a class C felony, asserting in part that the trial court abused its discretion when it excluded his videotaped statement to the police.⁵² Rule 103(a) provides:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked.⁵³

Barnett argued that “[u]nder the completeness doctrine, [he] was entitled to introduce the videotape[d] statement to avoid reference made to the statements on cross-examination from being taken out of context.”⁵⁴ Embodying the “completeness doctrine,”⁵⁵ Rule 106 provides: “When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.”⁵⁶

The Indiana Court of Appeals found the “completeness doctrine” inapplicable

47. *Id.* at 1286-87.

48. *Id.* at 1287.

49. *Id.*

50. *Id.* at 1288.

51. 916 N.E.2d 280 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 781 (Ind. 2010).

52. *Id.* at 282.

53. IND. R. EVID. 103(a).

54. *Barnett*, 916 N.E.2d at 286 (citation omitted).

55. *See Sanders v. State*, 840 N.E.2d 319, 323 (Ind. 2006).

56. IND. R. EVID. 106.

to this case because Barnett testified about the conversation that he had with the police regarding the alleged molestation, and the State did not offer the videotape or transcript of the conversation into evidence. Affirming Barnett's conviction, the Indiana Court of Appeals also held that Barnett failed to make an offer of proof with regard to the videotape or the transcript in accordance with Rule 103.⁵⁷

II. JUDICIAL NOTICE (RULE 201)

In *Taylor v. State*,⁵⁸ after his conviction for felony murder was affirmed by the Indiana Court of Appeals, Taylor petitioned for post-conviction relief, arguing that he received ineffective assistance of trial and appellate counsel because both failed to object to the trial court's final instructions.⁵⁹ The trial court denied Taylor's petition, and he appealed that ruling, asserting in part that the trial court committed reversible error when it refused to take judicial notice—pursuant to Rule 201(b) and (d)—of the Indiana Court of Appeals decision *Thomas v. State*.⁶⁰ Thomas was Taylor's co-defendant. In *Thomas*, the Indiana Court of Appeals held the trial court's failure to instruct the jury on the elements of robbery, the underlying felony for Thomas's felony murder conviction, to be a fundamental reversible error.⁶¹ The Indiana Court of Appeals agreed with Taylor, reversed his conviction, and remanded the case for a new trial.⁶²

III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS (RULE 301)

Rule 301 governs the application of presumptions in civil actions. It provides:

In all civil actions and proceedings not otherwise provided for by constitution, statute, judicial decision or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. A presumption shall have continuing effect even though contrary evidence is received.⁶³

A common interpretation of Rule 301 is that the rule requires the finder of fact to "find the presumed fact once the basic fact is established, unless the opponent of the presumption persuaded the factfinder of the nonexistence of the

57. *Barnett*, 916 N.E.2d at 286-87.

58. 922 N.E.2d 710 (Ind. Ct. App.), *trans. granted*, 940 N.E.2d 823 (Ind.), *trans. denied as improvidently granted*, 936 N.E.2d 1241 (Ind. 2010).

59. *Id.* at 712.

60. *Id.*; see *Thomas v. State*, 844 N.E.2d 229 (Ind. Ct. App. 2006) (unpublished table decision).

61. *Taylor*, 922 N.E.2d at 712 (citing *Thomas*, 844 N.E.2d at 229).

62. *Id.* at 719-20.

63. IND. R. EVID. 301.

presumed fact.”⁶⁴

In *Clay City Consolidated School Corp. v. Timberman*,⁶⁵ the plaintiffs brought a wrongful death action against the school corporation arising from the death of their thirteen-year-old son during basketball practice.⁶⁶ The trial court entered judgment on the jury’s verdict in favor of the parents. The Indiana Court of Appeals reversed the judgment and remanded the case for a new trial, holding that the trial court committed reversible error when it instructed the jury that “children from the age of 7 to 14 years of age are rebuttably presumed to be incapable of contributor[y] negligence.”⁶⁷ The Indiana Supreme Court granted transfer to resolve several questions, one of which was “whether Indiana law recognizes a rebuttable presumption that children between the ages of seven and . . . [fourteen] are incapable of contributory negligence.”⁶⁸ The Indiana Supreme Court noted that the standard of care for children between the ages of seven and fourteen is well-established:

Our cases have consistently declared that a child between seven and 14 is required to exercise due care for his or her own safety under the circumstances and that the care required is to be measured by that ordinarily exercised under similar circumstances by children of the same age, knowledge, judgment, and experience.⁶⁹

The court held that “a presumption is properly given continuing effect (and remains in the case) despite the presentation of contrary proof. . . . Rule 301 ‘authorizes a court to instruct the jury on permissible inferences that may be drawn from the basic facts that give rise to presumptions.’”⁷⁰ The Indiana Supreme Court affirmed the jury verdict for the parents and affirmed what it suggested in its decision in *Bottorff v. South Construction Co.*:⁷¹ “Indiana law recognizes a rebuttable presumption that children between the ages of seven and 14 are incapable of contributory negligence. . . .”⁷²

In *Value World Inc. of Indiana v. Review Board of the Indiana Department of Workforce Development*,⁷³ the Indiana Court of Appeals considered the quantum of evidence necessary to rebut the presumption that a party to an unemployment compensation appeal has received notice of the hearing when the case file indicates that the notice has been sent to the party’s correct address by

64. *Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 982 (Ind. 2006).

65. 918 N.E.2d 292 (Ind. 2009).

66. *Id.* at 293.

67. *Id.* at 294.

68. *Id.* at 293.

69. *Id.* at 295 (citing *Creasy v. Rusk*, 730 N.E.2d 659, 662 (Ind. 2000); *Smith v. Diamond*, 421 N.E.2d 1172, 1179 (Ind. Ct. App. 1981)).

70. *Clay City Consol. Sch. Corp.*, 918 N.E.2d at 296 (quoting *Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 985 (Ind. 2006)).

71. 110 N.E. 977 (Ind. 1916).

72. *Clay City Consol. Sch. Corp.*, 918 N.E.2d at 297.

73. 927 N.E.2d 945 (Ind. Ct. App. 2010).

U.S. mail. In addressing this question, the court of appeals first noted the general rule that “[w]here an administrative agency sends notice through the regular course of mail, a presumption arises that such notice is received; however, that presumption is rebuttable.”⁷⁴

The court then turned to appellant Value World’s contention that it had presented to the Indiana Department of Workforce Development (“review board”) evidence sufficient to rebut the presumption of receipt. The evidence presented by Value World consisted primarily of a Value World district manager denying that the company had received notice of the hearing by mail.⁷⁵ The court explained that since the adoption of Rule 301, presumptions “shall have continuing effect even though contrary evidence is received.”⁷⁶ Moreover, the court noted that the Indiana Supreme Court’s decision in *Schultz v. Ford Motor Co.* clarified that once “the opponent of the presumption meets the burden imposed,” the presumption “does not drop” from the case.⁷⁷

Applying these rules to the case at hand, the court turned to the question of whether Value World presented sufficient evidence to prove that it had not received notice of the hearing. Citing *KLR*, the court explained that the question of whether a party has overcome the presumption of receipt of notice is properly analyzed as a question of fact.⁷⁸ The court concluded that the review board had properly considered the issue as a question of fact and had relied on sufficient evidence—including the fact that Value World had consistently received mail without incident—in determining that Value World had failed to rebut the presumption of receipt.⁷⁹

IV. RELEVANCY AND ITS LIMITS (RULES 401-413)

A. Irrelevant Evidence—Rules 401 and 402

Pursuant to Rule 401, relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁸⁰ In *In re S.W.*,⁸¹ S.W. contended that the evidence of her drug test was irrelevant to the question of whether or not she was a “Child In Need of Services” (CHINS) pursuant to Indiana Code section 31-34-1-1.⁸² The Indiana Court of Appeals disagreed with S.W. (thereby agreeing with DCS), holding that “[a]lthough an

74. *Id.* at 948 (citing *KLR Inc. v. Ind. Unemployment Ins. Review Bd.*, 858 N.E.2d 115, 117 (Ind. Ct. App. 2006)).

75. *Id.* at 947.

76. *Id.* at 949 (quoting IND. R. EVID. 301).

77. *Id.* (citing *Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 985 (Ind. 2006)).

78. *Id.* at 949-50 (citing *KLR Inc.*, 858 N.E.2d at 119).

79. *Id.* at 950.

80. IND. R. EVID. 401.

81. 920 N.E.2d 783 (Ind. Ct. App. 2010).

82. *Id.* at 788.

adequately supervised teenager may find ways in which to experiment with illicit drugs, a child's drug use can be a direct product of a lack of parental supervision" and thereby relevant in a CHINS proceeding.⁸³

In *Chest v. State*,⁸⁴ Chest appealed his conviction for carrying a handgun without a license and other crimes, alleging in part that the trial court abused its discretion when it admitted evidence obtained during a warrantless police search of his vehicle following his arrest for refusing to provide identification.⁸⁵ The court explained, "Historically, there are two rationales for the search incident to arrest exception to the warrant requirement: 1) 'the need to disarm the suspect' or officer safety; and 2) 'the need to preserve evidence for later use at trial.'"⁸⁶ The police officer had taken Chest, the sole occupant of his vehicle, into custody.⁸⁷ Chest refused to identify himself, which is a criminal act itself.⁸⁸ "Therefore, only evidence of Chest's refusal to give his identity . . . [was] relevant evidence as defined by Evidence Rule 401."⁸⁹ In other words, there was no reason for police to search Chest's vehicle. Consequently, the Indiana Court of Appeals held that the search of Chest's vehicle, leading to the discovery of the gun, violated article 1, section 11 of the Indiana Constitution, resulting in the abrogation of Chest's conviction for carrying a handgun without a license.⁹⁰

B. Probative Value Versus Unfair Prejudice—Rule 403

In *Miller v. State*,⁹¹ Miller appealed his conviction of armed robbery. The Indiana Court of Appeals held that the trial court committed reversible error when it allowed the State to use an internet video (not entered into evidence) as a demonstrative aid in closing argument, which was created for school administrators to show how easy it was to conceal a weapon inside clothing.⁹² However, all three judges on the panel issued separate written opinions.⁹³ Although all three judges agreed on the application of Rule 403, i.e., that error occurred when the trial court allowed the use of video in the State's closing argument, they disagreed on whether it was reversible error. In the majority opinion, Judge May articulated that the "general rule" in Indiana is that "only

83. *Id.*

84. 922 N.E.2d 621 (Ind. Ct. App. 2010).

85. *Id.* at 622-23.

86. *Id.* at 625 (quoting *State v. Moore*, 796 N.E.2d 764, 767 n.5 (Ind. Ct. App. 2003)).

87. *Id.*

88. See IND. CODE § 34-28-5-3.5 (2011) (defining the crime of refusal to provide identification).

89. *Chest*, 922 N.E.2d at 625 n.5.

90. *Id.* at 626. Chest's convictions for driving with a suspended license and refusing to provide identification were affirmed. *Id.*

91. 916 N.E.2d 193 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 782 (Ind. 2010).

92. *Id.* at 194.

93. Judge May wrote for the majority, with Judge Barnes concurring and Chief Judge Baker writing in dissent.

exhibits that are properly admitted into evidence may be shown to the jury during final arguments.”⁹⁴ Judge May further rejected the State’s attempt to extend the holding in *Andrews v. State*⁹⁵ that the prosecutor merely used the video as a “courtroom demonstration,” which is “admissible subject to the trial court’s discretion.”⁹⁶ The *Miller* court cited *Andrews* in noting that “[c]harts and diagrams may be received into evidence after laying a proper foundation, *if the fact to be evidenced by the chart or diagram is itself otherwise relevant, material and competent* . . . [t]hus, the use of *admitted evidence in different forms* during summation has been permitted for demonstrative purposes.”⁹⁷ Here, and unlike in the *Andrews* case, the facts evidenced in the video had not been admitted into evidence in a different form at trial. Therefore, Judge May held the video inadmissible and reversed Miller’s conviction because of the video’s “obviously prejudicial effect.”⁹⁸ Judge Barnes agreed with the result reached in Judge May’s majority opinion but wrote a separate opinion to emphasize his stance that the video was the “proverbial evidentiary harpoon that skewed the ability of the jury to fairly and impartially decide the case.”⁹⁹ Chief Judge Baker agreed with “the majority’s conclusion that it was error for the trial court to permit the State to show the jury the video”; however, he did not agree that the error “was reversible error” because Miller, in his opinion, was not prejudiced by the introduction of the video.¹⁰⁰

In *Lainhart v. State*,¹⁰¹ Lainhart, appealing his conviction of misdemeanor intimidation, alleged that the trial court erred, at least in part, when it excluded a text message and accompanying testimony.¹⁰² The Indiana Court of Appeals reversed Lainhart’s conviction on other grounds and remanded the case. On this evidentiary issue, the Indiana Court of Appeals found the offer of proof made by Lainhart “sorely lacking” because “[t]he text message itself was never placed in the record,” leaving the court to speculate as to its content.¹⁰³ The court provided the following admonition to all parties: “We caution parties that this [c]ourt cannot review the propriety of evidentiary rulings if we are not furnished with the evidence in dispute.”¹⁰⁴ The court gleaned from the accompanying testimony that the text message “involved some sort of threat”¹⁰⁵ by the sender of the text message to Lainhart’s former girlfriend. The defense offered the message

94. *Miller*, 916 N.E.2d at 197 (citing *White v. State*, 541 N.E.2d 541, 548 (Ind. Ct. App. 1989)).

95. 532 N.E.2d 1159 (Ind. 1989).

96. *Id.* at 1165.

97. *Miller*, 916 N.E.2d at 198 (quoting *Andrews*, 532 N.E.2d at 1165).

98. *Id.*

99. *Id.* at 199 (Barnes, J., concurring).

100. *Id.* (Baker, C.J., dissenting).

101. 916 N.E.2d 924 (Ind. Ct. App. 2009).

102. *Id.* at 944.

103. *Id.*

104. *Id.*

105. *Id.*

pursuant to Rule 616 in an attempt to show bias on the part of the sender against Lainhart.¹⁰⁶ However, the Indiana Court of Appeals held that the trial court did not abuse its evidentiary discretion when, after weighing the probative value of the evidence against its prejudicial effect pursuant to Rule 403, it excluded the text message.¹⁰⁷ The text message had been sent to Lainhart's former girlfriend, not to Lainhart, "so its probative value in showing animosity from . . . [the sender] toward . . . [Lainhart] was already attenuated. . . . Contextualizing the message would have involved explanation of a number of collateral circumstances in an already convoluted case."¹⁰⁸ Ultimately, the proffered evidence was properly excluded pursuant to Rule 403 because it "posed dangers of confusing the jury and creating undue delay."¹⁰⁹

In *Rice v. State*,¹¹⁰ Rice appealed his conviction of reckless homicide, arguing in part that the trial court committed reversible error when it admitted autopsy photographs of the victim. At trial, the State introduced the autopsy photographs through the testimony of the pathologist. The pathologist used the photos to illustrate his testimony about the path of the bullet, an issue that both sides emphasized at trial.¹¹¹ In reviewing the admission of the photographs, the court of appeals pointed out that "[r]elevant evidence, including photographs, may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice."¹¹² Affirming Rice's conviction, the Indiana Court of Appeals held that the trial court did not abuse its discretion when it admitted the photographs—which, per Rice's request, included minimal blood, the covering of the victim's breasts, and a surgical opening—holding that the photographs were not "unnecessarily gruesome, such that their probative value . . . [was] outweighed by the danger of unfair prejudice."¹¹³

*McGaha v. State*¹¹⁴ involved a defendant who challenged his sixty-year murder sentence on the basis that the trial court erred in refusing to admit evidence that a third party was the true killer.¹¹⁵ A jury convicted Curtis McGaha of murdering his friend Brandon Stock when Stock came to McGaha's home to "front" McGaha an ounce of "high-quality" marijuana.¹¹⁶ Police recovered Stock's body in McGaha's backyard and found other physical evidence suggesting that Stock was killed inside McGaha's home.¹¹⁷ McGaha proposed the theory that an unknown third party, likely a drug supplier whom Stock had not

106. *Id.* at 944-45.

107. *Id.* at 945.

108. *Id.*

109. *Id.* (citing *Wood v. State*, 804 N.E.2d 1182, 1188-89 (Ind. Ct. App. 2004)).

110. 916 N.E.2d 962 (Ind. Ct. App. 2009).

111. *Id.* at 966-67.

112. *Id.* at 966 (quoting *Swingley v. State*, 739 N.E.2d 132, 133 (Ind. 2000)).

113. *Id.* (citing IND. R. EVID. 403).

114. 926 N.E.2d 1050 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 819 (Ind. 2010).

115. *See id.* at 1055-57.

116. *Id.* at 1052.

117. *Id.* at 1053.

paid for his product, had murdered Stock and placed his body in McGaha's backyard in order to frame McGaha. The trial court, however, granted the State's motion to exclude McGaha's references to a "[t]hird-[p]arty [m]otive," as well as testimony regarding a supposed drug supplier named "Sam," who was a Mexican living in Evansville.¹¹⁸

The Indiana Court of Appeals found no error in the trial court's exclusion of McGaha's proffered evidence, which contained information compiled by investigators for the sheriff's department.¹¹⁹ Three interview subjects told the investigators that someone named "Sam" had supplied Stock with his marijuana. Also, the investigators documented a phone call in which the caller stated that an acquaintance told her that a Mexican man named Sam had killed Stock,¹²⁰ but neither the interview subjects nor the caller possessed firsthand knowledge of any conduct or statements of Sam or of any dealings between Sam and Stock. Moreover, at trial, Zachary Howard testified that he had grown the marijuana at issue, supplied it to Stock, and invented the fictitious persona of "Sam," a Mexican drug supplier, to pressure Stock when Stock did not pay Howard promptly after Stock's (apparently ill-fated) transaction with McGaha.¹²¹ Because McGaha did not provide any evidence connecting "Sam" to Stock's murder, the court concluded that the trial court properly excluded the third-party evidence under Rule 403.¹²²

The Indiana Court of Appeals addressed two Rule 403 issues in *Hatter v. Pierce Manufacturing, Inc.*:¹²³ the exclusion of cumulative (in this case, expert) testimony and the exclusion of rebuttal evidence due to undue delay.¹²⁴ The plaintiff, a firefighter injured when pressurized air propelled a cap on the rear intake pipe of a fire truck into his face, offered expert testimony regarding safer alternative designs that the defendant manufacturer could have employed.¹²⁵ The trial court sustained the defendant's relevance objection to a portion of this testimony. The court of appeals upheld the lower court's ruling, noting that although such evidence was relevant to the plaintiff's case generally, he had already presented testimony on the issue, and the excluded testimony would have been needlessly cumulative.¹²⁶ The court of appeals also found that the trial court had not abused its discretion in excluding the plaintiff's rebuttal evidence, which the plaintiff would have used to further impeach a defense expert he had already cross-examined.¹²⁷ Because the testimony was only "marginally relevant" and the plaintiff had unduly delayed its presentation, the court concluded that the trial

118. *Id.*

119. *Id.* at 1053-55.

120. *Id.* at 1054.

121. *Id.*

122. *Id.* at 1055.

123. 934 N.E.2d 1160 (Ind. Ct. App. 2010).

124. *Id.* at 1173-75.

125. *Id.* at 1165.

126. *Id.* at 1174.

127. *Id.* at 1174-75.

court acted within its discretion in excluding it.¹²⁸

C. Intent Exception to Rule 404(b)

In *Clark v. State*,¹²⁹ the Indiana Supreme Court for the first time addressed the limits of Rule 404(b) in the social networking context. Clark appealed his conviction for murder, alleging that the trial court should not “have permitted the State to offer into evidence Clark’s entry from the social networking website MySpace[.]”¹³⁰ Clark posted the following description of himself on his MySpace page:

Society labels me as an outlaw and criminal and sees more and more everyday how many of the people, while growing up, and those who judge me, are dishonest and dishonorable. Note, in one aspect I’m glad to say I have helped you people in my past who have done something and achieved on the other hand, I’m sad to see so many people who have nowhere. To those people I say, if I can do it and get away. B . . . sh. . . And with all my obstacles, why the f . . . can’t you.¹³¹

“Clark . . . [contended that] the trial court abused its discretion when it admitted evidence of his MySpace posting,” asserting that it amounted to inadmissible character evidence under Rule 404(b).¹³² The MySpace statements made by Clark contained only statements about himself, not of prior criminal acts.¹³³ As a result, the Indiana Supreme Court held this electronic evidence admissible, ultimately holding that Rule 404(b) did not apply because the evidence dealt with “Clark’s words and not his deeds.”¹³⁴ Additionally, the court held the evidence relevant to rebut Clark’s defense in this case that he acted recklessly and not criminally, thus making his character a central issue in the case.¹³⁵

In *Prairie v. State*,¹³⁶ Prairie appealed his conviction of identity deception,¹³⁷ claiming in part that the trial court committed reversible error when it admitted “other bad acts evidence” under Rule 404(b) of his prior relationship with the victim (and prior identify theft).¹³⁸ The State properly filed a motion under Rule 404(b) prior to trial seeking to admit the 404(b) evidence. The trial court granted the motion, determining that “it was probative on the question of the relationship

128. *Id.* at 1175.

129. 915 N.E.2d 126 (Ind. 2009), *reh’g denied*.

130. *Id.* at 128.

131. *Id.* at 129 (citation omitted).

132. *Id.*

133. *Id.* at 130.

134. *Id.*

135. *Id.*

136. 914 N.E.2d 294 (Ind. Ct. App. 2009).

137. See IND. CODE § 35-43-5-3.5 (2011).

138. *Prairie*, 914 N.E.2d at 295.

between Prairie and . . . [the victim].”¹³⁹ The State contended that

the challenged evidence was not introduced to show Prairie’s propensity to engage in crime or that his behavior was in conformity with a character trait. Instead, it was introduced to show that by giving . . . [the victim’s] name and identifying information as a billing address to the hospital, and by indicating on the form that he, as . . . [the victim], was self-insured and would pay for the treatment himself, Prairie intended thereby not to avoid arrest [on outstanding warrants], but to defraud . . . [the victim].¹⁴⁰

The Indiana Court of Appeals, agreeing with the trial court, held that the victim’s testimony on his prior relationship with Prairie—and, by extension, Prairie’s prior bad acts—was probative on the question of Prairie’s intent to deceive the hospital and avoid paying the hospital bill and that the probative value of the evidence outweighed the potential prejudicial effect.¹⁴¹

In *Lafayette v. State*,¹⁴² Lafayette was convicted by jury of rape and related charges “based in part on evidence of a ten-year-old conviction for attempted rape of another woman.”¹⁴³ Indiana law only allows the introduction of Rule 404(b) evidence of prior crimes “to prove the character of a person in order to show action in conformity therewith”¹⁴⁴ under certain circumstances, e.g., as in this case, to show intent.¹⁴⁵ The Indiana Supreme Court reversed and remanded Lafayette’s conviction because the State failed to show that the Rule 404(b) intent exceptions applied.¹⁴⁶ The facts most favorable to the conviction indicated the following:

[I]n July, 2007, C.E. told the police that Defendant had raped her. Defendant admitted that he and C.E. had had sexual intercourse but claimed that it had been consensual. Prior to trial, the State filed notice that it intended to introduce . . . [Defendant’s] 1997 conviction for the attempted rape of another woman as evidence of Defendant’s intent to rape C.E.¹⁴⁷

In this case, “the State was required to prove beyond a reasonable doubt that . . . [Lafayette] ‘knowingly or intentionally [had] sexual intercourse with [C.E.] when [C.E. was] . . . compelled by force or imminent threat of force.’”¹⁴⁸

139. *Id.* at 296.

140. *Id.* at 298. Intent to defraud is an element of the offense of identity deception. *See* IND. CODE § 35-43-5-3.5(a)(2)(A).

141. *Prairie*, 914 N.E.2d at 299.

142. 917 N.E.2d 660 (Ind. 2009).

143. *Id.* at 662.

144. IND. R. EVID. 404(b).

145. *Lafayette*, 914 N.E.2d at 662.

146. *Id.*

147. *Id.*

148. *Id.* (quoting IND. CODE § 35-42-4-1(a)(1) (2011)).

Lafayette admitted that he had had sexual intercourse with C.E.; therefore, “neither the fact that he had had intercourse with C.E. nor his intent to do so were at issue.”¹⁴⁹ Instead, “the dispute was over whether C.E. had been ‘compelled by force or imminent threat of force[,]’” not the mens rea at the time of the commission of the alleged crime.¹⁵⁰ The Indiana Court of Appeals ultimately held that “the intent exception is available when a defendant goes beyond merely denying the charged culpability and alleges a particular contrary intent.”¹⁵¹ Furthermore, “questioning a prosecuting witness’s credibility[, even the alleged victim’s,] should not open the door to prior misconduct evidence.”¹⁵² “[A] defendant’s use of the defense of consent in a rape prosecution is not, standing alone, enough to trigger the availability of the intent exception.”¹⁵³

In *Embry v. State*,¹⁵⁴ Embry appealed his conviction of domestic battery (beating his ex-wife) by asserting that the trial court erred when it admitted evidence of his prior bad acts towards the victim as a means to rehabilitate her testimony.¹⁵⁵ Embry claimed that he acted in self-defense when he battered his ex-wife. Embry’s attorney impeached Embry’s ex-wife on cross-examination by eliciting evidence of her animosity towards Embry, thereby attacking her credibility pursuant to Rules 607 and 616 (showing evidence of bias).¹⁵⁶ The State attempted to rehabilitate the ex-wife on redirect by offering evidence of five prior acts of violence perpetrated by Embry towards his ex-wife in order to explain the hostility.¹⁵⁷ The Indiana Court of Appeals agreed that a party “may not offer evidence of prior misconduct committed by the defendant against the witness solely to explain the witness’s disposition[,]”¹⁵⁸ departing from those jurisdictions that allow such rehabilitative testimony.¹⁵⁹ However, the court, affirming Embry’s conviction, went on to find the evidence “admissible to prove motive and negate . . . [Embry’s] self-defense claim.”¹⁶⁰

149. *Id.* (citation omitted).

150. *Id.* (citing *Bryant v. State*, 644 N.E.2d 859, 860-61 (Ind. 1994) (making a similar argument)).

151. *Id.* at 663.

152. *Id.* at 665.

153. *Id.*

154. 923 N.E.2d 1 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 792 (Ind. 2010).

155. *Id.* at 6.

156. *Id.* at 7.

157. *Id.* at 3, 7 (citing 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, *FEDERAL PRACTICE & PROCEDURE* § 6098 (2d ed. 2007) (“Evidence offered to explain or justify an admitted bias does not logically refute the effect of bias on credibility.”)).

158. *Id.* at 3.

159. *Id.* at 8 (“Offering the defendant’s prior bad acts to explain a witness’s animosity only reinforces—rather than disproves—the witness’s disposition.”).

160. *Id.* at 3, 9 (“[N]umerous cases have held that where a relationship between parties is characterized by frequent conflict, evidence of the defendant’s prior assaults and confrontations with the victim may be admitted to show the relationship between the parties and motive for committing the crime.” (citation omitted)).

In *Wilson v. State*,¹⁶¹ defendant Wilson appealed his conviction for receiving stolen auto parts and driving while suspended, asserting in part that the trial court erred in admitting his complete Bureau of Motor Vehicles (BMV) record, which contained prejudicial evidence of prior bad acts.¹⁶² The state offered Wilson's BMV record to corroborate testimony that he was driving on a suspended license, as Wilson had previously been convicted of the same offense.¹⁶³

At trial, Wilson objected to the evidence, but only on the ground that it was not properly certified.¹⁶⁴ Thus, the court of appeals concluded that Wilson had waived any argument that the evidence was inadmissible under Rule 404(b).¹⁶⁵ Notwithstanding such waiver, the defendant argued that the admission of his complete BMV record constituted fundamental error, relying in part on the holding of *Rhodes v. State*.¹⁶⁶ In *Rhodes*, the trial court committed fundamental error in admitting a "flood of irrelevant and prejudicial [character] evidence."¹⁶⁷ Wilson, however, faced no such "flood" of irrelevant character evidence,¹⁶⁸ even though his BMV record should have been redacted before admission. Specifically, the State had not highlighted "any unrelated character evidence"¹⁶⁹ contained in Wilson's record. Thus, its admission failed to qualify as "so prejudicial that it made it impossible for Wilson to receive a fair trial" and did not rise to the level of fundamental error.¹⁷⁰

D. Motive Exception to Rule 404(b)

In *Wilkes v. State*,¹⁷¹ Wilkes appealed his conviction of a triple murder and the death sentence imposed as the penalty for said crimes, asserting in part that the trial court violated the *corpus delicti* rule and committed reversible error when it admitted evidence of his confession to molesting Avery, his thirteen-year-old murder victim.¹⁷² The Indiana Supreme Court found the *corpus delicti* rule inapplicable because it "does not apply to evidence of crimes offered under Rule 404(b) to establish motive or intent because there is no danger of conviction for those crimes."¹⁷³ Here, the State offered Wilkes's admission to molesting Avery to prove his motive for killing her.¹⁷⁴ In affirming Wilkes's conviction and death

161. 931 N.E.2d 914 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 828 (Ind. 2010).

162. *Id.* at 919.

163. *Id.* at 916.

164. *Id.*

165. *Id.* at 918.

166. *Id.* at 920 (citing *Rhodes v. State*, 771 N.E.2d 1246 (Ind. Ct. App. 2002)).

167. *Rhodes*, 771 N.E.2d at 1256.

168. *Wilson*, 931 N.E.2d at 920.

169. *Id.*

170. *Id.* at 920-21.

171. 917 N.E.2d 675 (Ind. 2009), *reh'g denied*, *cert. denied*, 131 S. Ct. 414 (2010).

172. *Id.* at 684.

173. *Id.*

174. *Id.*

sentence, the Indiana Supreme Court held that the trial court properly admitted this evidence.¹⁷⁵

In *Allen v. State*,¹⁷⁶ Allen stood convicted of three counts of murder and felony arson.¹⁷⁷ Allen started a fire in the apartment complex where he lived with his wife, Christy Gipson, and infant daughter, Javonae.¹⁷⁸ The fire resulted in the deaths of Christy, Javonae, and a neighbor, Prabhat Singhal—as well as severe burns to another neighbor, Manoj Rana.¹⁷⁹ At trial, the State introduced evidence that Allen was engaged in an affair with a former co-worker at the time of the fire.¹⁸⁰ Allen objected on the ground that the evidence was barred by Rule 404(b). On appeal, the State argued that the trial court properly admitted the evidence as proof of Allen's motive to kill his wife and daughter.¹⁸¹

The Indiana Court of Appeals agreed, distinguishing the case at bar from its 2004 decision in *Camm v. State*, where it ruled that the trial court erred in admitting similar evidence.¹⁸² Like Allen, the defendant in *Camm* faced charges that he killed his wife and children. The State presented “extensive evidence of . . . [Camm's] extramarital affairs and attempts to engage in extramarital affairs.”¹⁸³ The *Camm* court found that the trial court had erred in admitting the evidence and held that in order for such evidence to be admissible, either (1) it needed to “be accompanied by evidence that such activities had precipitated violence or threats between the victim in the past” or (2) the defendant must have been “involved in an extramarital relationship at the time of the completed or contemplated homicide.”¹⁸⁴

Allen's case stood readily distinguishable from Camm's. Unlike Camm, Allen was having an affair at the time he allegedly killed his wife. Additionally, Allen had stated that he was going to kill a member of his family, was angry the night before the murders because his wife had bought clothing for the baby, and had called his wife a “monster” and his daughter “a hollering, greedy mother fu* *er.”¹⁸⁵ Thus, Allen's extramarital affair was relevant to his motive.¹⁸⁶

175. *Id.* at 684, 693.

176. 925 N.E.2d 469 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 795 (Ind. 2010).

177. *Id.* at 471.

178. *Id.* at 471-76.

179. *Id.* at 475.

180. *Id.* at 477.

181. *Id.*

182. *Id.* at 477-78 (citing *Camm v. State*, 812 N.E.2d 1127, 1131-33 (Ind. Ct. App. 2004)).

183. *Id.*

184. *Id.* at 478 (quoting *Camm*, 812 N.E.2d at 1133).

185. *Id.* (citation omitted).

186. *Id.* at 478-79. Without citing a specific rule, the court of appeals also held that Allen was not prejudiced by the trial's court's admission of photographs (which contained descriptive captions) during the testimony of a fire investigator. *Id.* at 477. The court found that any error in admitting the captioned photographs was harmless, as the captions were at worst cumulative of previous testimony. *Id.*

E. Plan Exception to Rule 404(b)

In *Akard v. State*,¹⁸⁷ Jeffrey Akard appealed his convictions for rape, criminal deviate conduct, criminal confinement, and battery on several grounds, including his contention that the trial court erred in admitting certain pornographic images that police found on his laptop and in his apartment.¹⁸⁸ Akard's victim, A.A., testified that during her confinement, Akard had bound and gagged her, and he had urinated in her mouth.¹⁸⁹

Pornographic images recovered from Akard's laptop depicted women bound and gagged in a similar fashion to what A.A. described in her testimony. Also, A.A. shared a similar body type with the women depicted in the images.¹⁹⁰ Akard had shaved A.A.'s genitalia and put stockings on A.A.'s legs while she was unconscious. All of these facts, the court of appeals explained, indicated "Akard's plan to make A.A. resemble the pictures stored on the laptop."¹⁹¹ Thus, the court determined that the images were admissible under Rule 404(b), which prohibits the admission of evidence of other crimes, wrongs or acts offered to prove the character of the person in order to show action in conformity therewith, but which in some circumstances allows the admission of such evidence as proof of a defendant's "plan."¹⁹² Additionally, due to the close connection between the images and what Akard did to A.A., the court held that the danger of unfair prejudice resulting from the admission of the exhibit did not outweigh its probative value for the purposes of Rule 403.¹⁹³

On the other hand, the court determined that the trial court erred in its admission of a magazine page found in Akard's apartment that depicted adults urinating on each other, as it clearly was offered to "demonstrate Akard's character and propensity to commit such an act."¹⁹⁴ Nevertheless, this did not constitute reversible error given "the voluminous evidence supporting the charges [for which Akard was] actually tried."¹⁹⁵

187. 924 N.E.2d 202 (Ind. Ct. App.), *aff'd in relevant part*, 937 N.E.2d 811 (Ind. 2010).

188. *Id.* at 206. In addition to the evidentiary issues presented, *Akard* is also noteworthy because the court of appeals revised the defendant's original sentence of ninety-three years *upward* to 118 years. *Id.* at 206, 212. Akard had requested that the court revise his sentences so that they ran concurrently, for an aggregate sentence of forty years. *Id.* at 211. Initially, this request backfired, to say the least. Ultimately, however, the Indiana Supreme Court overturned the revised sentence but affirmed the decision of the court of appeals in all other respects. The Supreme Court did correct the original sentence of ninety-three years to ninety-four years to address the trial court's "ministerial" error in calculating the original sentence. *Akard*, 937 N.E.2d at 812-14.

189. *Akard*, 924 N.E.2d at 205-06.

190. *Id.* at 207.

191. *Id.*

192. IND. R. EVID. 404(b).

193. *Akard*, 924 N.E.2d at 207.

194. *Id.*

195. *Id.*

F. Compromise and Offers to Compromise—Rule 408

In *Bules v. Marshall County*,¹⁹⁶ the driver of a tractor-trailer and his passenger brought an action against the county and its highway department alleging negligent warning of a dangerous road condition and sought to recover damages for injuries sustained when the driver hit high water and lost control of his vehicle.¹⁹⁷ The trial court granted the defendants' motion for summary judgment based upon the Indiana Tort Claims Act,¹⁹⁸ which "provides governmental units immunity from liability for losses caused by temporary weather conditions."¹⁹⁹ The Indiana Supreme Court "previously held that this immunity applies during the period of reasonable response to a weather condition."²⁰⁰ In *Bules*, the court held that the "period lasts at least until the weather condition has stabilized, and [it] immunizes the governmental unit from liability for alleged flaws in its remedial steps."²⁰¹ The Buleses attempted to avoid the immunity claim by asserting that the county had either admitted liability or waived any claim of immunity through its insurance agent. The county's insurance agent sent a letter to the victims stating that "the [i]nsurance [c]arrier for Marshall County . . . has accepted liability for the accident."²⁰² The county did not dispute that the insurance agent was acting on its behalf as "part of ongoing settlement negotiations between the agent and the Buleses."²⁰³ On appeal, the Indiana Supreme Court affirmed the grant of summary judgment in favor of the defendants and held that the trial court properly excluded the insurance agent's letter from the evidence pursuant to Rule 408.²⁰⁴

G. Withdrawn Pleas and Offers—Rule 410

In *Scott v. State*,²⁰⁵ Scott appealed his conviction for two counts of possession of a firearm by a serious violent felon, one count of felony battery with a deadly weapon, one count of felony pointing a firearm, and one of resisting law enforcement, alleging in part that the trial court erred when it admitted evidence of "his *nolo contendere* plea to a Florida murder as proof that he was convicted of an offense that qualifies him as a serious violent felon under . . . [Indiana Code

196. 920 N.E.2d 247 (Ind. 2010).

197. *Id.* at 249-50.

198. IND. CODE § 34-13-3-3(3) (2011).

199. *Bules*, 920 N.E.2d at 248.

200. *Id.* at 248-49.

201. *Id.* at 249.

202. *Id.* at 252.

203. *Id.*

204. *Id.* ("A party may concede some points in an attempt to reach a compromise without waiving them if no agreement can be reached." (citing *Worman Enters., Inc. v. Boone Cnty. Solid Waste Mgmt. Dist.*, 805 N.E.2d 369, 376-77 (Ind. 2004))).

205. 924 N.E.2d 169 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 795 (Ind. 2010), *cert. denied*, 131 S. Ct. 939 (2011).

section] 35-47-4-5(a).”²⁰⁶ In this case of first impression, the Indiana Court of Appeals held that the evidence of the plea was admissible under both Rule 803(22), which specifically refers to *nolo contendere* pleas, and Rule 803(8), the more general hearsay rule exception for public records.²⁰⁷ The State merely used the evidence to establish the fact of the prior felony conviction, not the underlying facts that led to the conviction; therefore, the court held the evidence admissible under Rules 410.²⁰⁸ The court did reverse the trial court’s judgment in part (not related to this evidentiary issue) and affirmed the remainder of the trial court’s judgment. Specifically, the court found that the trial court erred in refusing to give a tendered jury instruction from the defendant pertaining to the pointing a firearm charge and remanded the case for further proceedings.²⁰⁹

In *Gonzalez v. State*,²¹⁰ the defendant was convicted of criminal mischief, operating a vehicle while intoxicated, and operating a vehicle while intoxicated injuring a person after he ran a stop sign and hit a school bus. As part of his attempt to negotiate a plea, Gonzalez penned a letter apologizing for the incident and admitting that he had been drinking alcohol beforehand.²¹¹ Subsequently, the trial court allowed the State to admit the letter as substantive evidence of Gonzalez’s guilt. The court of appeals held that the letter constituted a privileged communication made in connection with the plea negotiation process that the trial court should have excluded under Rule 410, and that the error was not harmless.²¹² Granting transfer, the Indiana Supreme Court agreed with the court of appeals that admitting the letter was error.²¹³ The court set forth the following test for determining when statements made in connection with plea agreements are inadmissible under Rule 410:

[F]or a statement to be a privileged communication, the defendant must have been charged with a crime at the time of the statement and the prosecutor and the defendant must have initiated discussions related to a plea agreement. Second, the statement must have been made with the intent of seeking a plea agreement or in contemplation of a proposed agreement. Third, the statement is privileged if made to someone who has the authority to enter into or approve a binding plea agreement or

206. *Id.* at 172, 177.

207. *Id.* at 177-79. Unlike in a civil case, where this evidence would have been offered to prove the underlying facts of the crime, the evidence of the *nolo contendere* plea was “offered only to prove that . . . [Scott] was convicted of murder,” therefore making it admissible under Rule 803(22). *Id.* at 177 (citation omitted).

208. *Id.* at 178 n.3.

209. *Id.* at 176-77.

210. 929 N.E.2d 699 (Ind. 2010).

211. *Id.* at 700.

212. *Gonzalez v. State*, 908 N.E.2d 313, 315, 317 (Ind. Ct. App. 2009), vacated by *Gonzalez*, 929 N.E.2d 699 (Ind. 2010).

213. *Gonzalez*, 929 N.E.2d at 702.

who has a right to object to or reject the agreement.²¹⁴

However, the supreme court found the error to be harmless in light of the “overwhelming” evidence against Gonzalez.²¹⁵

H. Liability Insurance—Rule 411

Rule 411 provides as follows:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.²¹⁶

“The purpose of Rule 411 and its federal counterpart is to prevent juries from inferring fault or calculating damages based on parties’ liability coverage or lack thereof.”²¹⁷ In *Spaulding v. Harris*, the Indiana Court of Appeals held that the trial court did not abuse its discretion when it redacted the words “Department of Insurance” from the medical review panel’s certified opinion pursuant to Rule 411 because it found that the probative value of bolstering the opinion’s authenticity was outweighed by the prejudicial effect of indicating that the hospital was insured pursuant to Rule 403.²¹⁸

In *Brown-Day v. Allstate Insurance Co.*,²¹⁹ the Indiana Court of Appeals accepted an interlocutory appeal to resolve certain issues related to Rule 411 (and other evidentiary issues).²²⁰ Brown-Day, insured by Allstate (with \$100,000 in underinsured benefits) was involved in a motor vehicle accident with Lobdell, who was insured by American Family Insurance (with a \$50,000 liability limit). Originally, Brown-Day sued Lobdell, who admitted liability, and the parties settled the lawsuit for Lobdell’s policy limit of \$50,000.²²¹ Brown-Day, with permission from the trial court, then filed an amended complaint naming Allstate as the defendant and seeking the additional \$50,000 available under her underinsured policy.²²² Allstate denied that Brown-Day sustained damages in excess of \$50,000 and filed a motion seeking to substitute Lobdell as the named defendant in this case and prohibit Brown-Day from making any reference to insurance, citing Rule 411. The trial court granted Allstate’s motion, ordering

214. *Id.*

215. *Id.* at 703.

216. IND. R. EVID. 411.

217. *Spaulding v. Harris*, 914 N.E.2d 820, 830 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 788 (Ind. 2010).

218. *Id.* at 831.

219. 915 N.E.2d 548 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 791 (Ind. 2010).

220. *Id.* at 551.

221. *Id.* at 550.

222. *Id.*

that “Lobdell be identified as the sole designated defendant ‘for purposes of the trial of this action’ and that the parties ‘shall not mention or refer to the fact [that] this is an underinsured motorist claim’” or make any other reference that illustrated that Lobdell or Brown-Day were insured.²²³ Brown-Day argued that under Rule 411, excluding all reference to insurance or insurers was not justifiable in this case because liability had been admitted.²²⁴

The Indiana Court of Appeals, in reversing the trial court’s decision, found that “Rule 411 speaks [only] to the admissibility of evidence . . . offered to show that a party acted negligently or wrongfully so that a jury is not induced to decide a case on improper grounds,” not the exclusion of all references to insurance in a case.²²⁵ In this case, where liability had been conceded, the only issue that remained was the amount of damages. The court rejected Allstate’s argument in its entirety, stating:

Regardless of academic argument as to whether a jury is likely to assess greater damages against a deep-pocket insurance company, Evidence Rule 411 simply is not a mechanism providing for an outright substitution of parties so that the identity of a party as an insurer may be shielded. It does not contemplate the creation of a fiction to avoid possible prejudicial effects from a reference to insurance or an insurer.²²⁶

Allstate stood as the real party in interest. Brown-Day directly sought benefits for which she had contracted with Allstate. Therefore, the Indiana Court of Appeals held that the trial court erred when it substituted Lobdell for Allstate as the named party in this case.²²⁷

Similarly, in *Howard v. American Family Mutual Insurance Co.*, the Indiana Court of Appeals followed the *Brown-Day* decision and held that the trial court had erred in substituting the uninsured motorist who caused the accident with the insured as the sole named defendant in insured’s uninsured motorist coverage

223. *Id.* at 550-51 (citation omitted).

224. *Id.* at 551.

225. *Id.*

226. *Id.* (citation omitted).

227. *Id.* at 553. The court rejected Allstate’s citation to the case of *Wineinger v. Ellis*, 855 N.E.2d 614 (Ind. Ct. App. 2006), noting that unlike in the *Wineinger* case, Allstate did not make an “offer of full payment in order to ‘step into the shoes’ of . . . [the] tortfeasor.” *Brown-Day*, 918 N.E.2d at 552. The court further clarified its opinion in *Wineinger*, stating,

Wineinger does not prohibit all references to insurers or insurance; rather, it addressed very specific circumstances. [In *Wineinger*, a]n insurer otherwise liable only for its contract obligations chose to forego a right of subrogation and contract limitations and agreed to total liability for any damages caused by a tortfeasor, as if the insurer were the tortfeasor. As such, the claim tried before the jury in *Wineinger* was substantively a tort claim.

Id. at 552-53. Here, the case to be tried sounded solely in contract, a contract between Brown-Day and Allstate. *Id.* at 553.

lawsuit.²²⁸ The court of appeals also instructed the court below, on remand, to deny the insurer's motion in limine to the extent it sought to prevent exclusion of any reference to the insurer, though the trial court retained authority to exclude other evidence of the dealings between the insured and his insurer under Rules 402, 403, and 411.²²⁹

I. Rape Shield Issues—Rule 412

Indiana's Rape Shield Rule, Rule 412, "incorporates the basic principles" of Indiana's Rape Shield Act.²³⁰ In addition to the exceptions enumerated in Rule 412(a), "a common-law exception has survived the 1994 adoption of the . . . [Rules]."²³¹ The common-law exception provides that "evidence of a prior accusation of rape is admissible if: (1) the victim has admitted that his or her prior accusation of rape is false; or (2) the victim's prior accusation is demonstrably false."²³²

In *State v. Luna*,²³³ the trial court acquitted the defendant, Genaro Luna, of eight counts of child molesting. Luna was accused of molesting T.P., his stepdaughter, at the time of the alleged crimes.²³⁴ The State appealed on a reserved question of law under Indiana Code section 35-38-4-2(4), which allows the State to "obtain opinions of law which shall declare a rule for the guidance of trial courts on questions likely to arise again in criminal prosecutions."²³⁵ Specifically, the State asserted that the trial court had erred in admitting evidence that T.P. had made prior allegations of child molesting against another person, where the only evidence that her previous allegations were false was the fact that the other alleged perpetrator never faced criminal charges.²³⁶ The Indiana Court of Appeals declined to reach the merits of the State's appeal, as the State itself had presented evidence of T.P.'s prior allegation, and the State did not object when the issue was raised by defense counsel on cross-examination.²³⁷ Thus, the State's objection was waived. Moreover, because the question of whether T.P.'s prior allegation was demonstrably false and was factual in nature, the issue was inappropriate as a question of law.²³⁸

228. *Howard v. Am. Family Mut. Ins. Co.*, 928 N.E.2d 281, 283-85 (Ind. Ct. App. 2010).

229. *Id.* at 285.

230. *State v. Walton*, 715 N.E.2d 824, 826 (Ind. 1999) (confirming Rule 412's incorporation of the principles of Indiana Code section 35-37-4-4, Indiana's Rape Shield Act).

231. *Oatts v. State*, 899 N.E.2d 714, 720 (Ind. Ct. App. 2009) (citing *Walton*, 715 N.E.2d at 826-28).

232. *Id.* (citation omitted).

233. 932 N.E.2d 210 (Ind. Ct. App. 2010).

234. *Id.* at 211.

235. *Id.* at 212 (citing *State v. Overmyer*, 712 N.E.2d 506, 507 (Ind. Ct. App. 1999)) (emphasis added).

236. *Id.*

237. *Id.* at 213.

238. *Id.* at 214-15.

V. PRIVILEGES (RULE 501)

In *Shell v. State*,²³⁹ the Indiana Court of Appeals held that Officer Early, who testified for the State, had not waived the confidentiality of the identity of his informant, C.I. The court of appeals noted that the general policy under Indiana law is to prevent the disclosure of a confidential informant's identity unless the defendant demonstrates that "disclosure is relevant and helpful to his defense or is necessary for a fair trial."²⁴⁰ The court cited Rule 501(b), which provides that a privilege against disclosure is waived if the party holding the privilege "voluntarily discloses or consents to disclose any significant part of the privileged matter."²⁴¹ The defendant pointed to a portion of the suppression hearing transcript in which defense counsel questioned Early about C.I. The transcript revealed that the State had objected to a direct question about C.I.'s name.²⁴² While Early mentioned C.I. with reference to an earlier case, he did not identify C.I. by name in the present case or with reference to the earlier case. The court of appeals concluded that there was no evidence that the State had disclosed the identity of C.I. in the earlier case. Thus, the privilege remained intact.²⁴³

VI. WITNESSES (RULES 601-617)

A. Lack of Personal Knowledge and Opinion Testimony—Rules 602 and 701

In *Dunn v. State*,²⁴⁴ Dunn appealed his conviction of battery causing serious bodily injury, in part asserting that the trial court committed reversible error when it admitted a voicemail message from his girlfriend ("Mathys") to the victim ("Rollins").²⁴⁵ Mathys testified on direct that she did not witness the incident between Dunn and Rollins. On cross, when the State asked Mathys whether she apologized to Rollins for Dunn's behavior, Mathys testified that she did not remember. The State then asked Mathys "whether she remembered making a phone call to Rollins about an hour after the incident and leaving a voicemail message"; she again stated that she did not remember.²⁴⁶ The State then asked that the voicemail message be admitted. Dunn's counsel objected, asserting that a proper foundation had not been laid for admission of the voicemail message.²⁴⁷ The State responded that Rollins had testified on redirect that he received a phone call from Mathys about an hour or an hour and a half after the incident. Outside

239. 927 N.E.2d 413 (Ind. Ct. App. 2010).

240. *Id.* at 420 (citing *Mays v. State*, 907 N.E.2d 128, 131 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 991 (Ind. 2009)).

241. IND. R. EVID. 501(b).

242. *Shell*, 927 N.E.2d at 421.

243. *Id.* at 420-21.

244. 919 N.E.2d 609 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 790 (Ind. 2010).

245. *Id.* at 610-11.

246. *Id.* at 611.

247. *Id.*

the presence of the jury, the State played the voicemail message to Mathys to refresh her recollection. After the jury was brought back into the courtroom, the State asked Mathys whether it was her voice on the voicemail message, and she said yes.²⁴⁸ The trial court then admitted the voicemail message over Dunn's objection, and it was played to the jury. The message was the following:

[Rollins] . . . it's . . . [Mathys]. I'm so sorry for what . . . [Dunn] did to you. There's no reason for him to do that. He's just—just jealous and there's no point. I really do apologize for the way that he treated you and he owes you an apology, too. But hopefully you're all right. I'm really sorry about what he did. I'm so sorry.²⁴⁹

At trial, Dunn admitted to hitting Rollins but claimed self-defense as a justification. Dunn argued that the voicemail message was inadmissible pursuant to Rules 602 and 701, ultimately asserting that the State failed to lay a proper foundation.²⁵⁰

Rule 602 provides:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. A witness does not have personal knowledge as to a matter recalled or remembered, if the recall or remembrance occurs only during or after hypnosis. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness.²⁵¹

Rule 701 states:

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to the clear understanding of the witness's testimony or the determination of a fact in issue.²⁵²

The court held that a proper foundation had been laid by the State because "Rule 602 does not require that personal knowledge be established by the witness's testimony. Here, other evidence establishe[d] that Mathys had personal knowledge of the incident."²⁵³ Additionally, "Mathys testified that she had dated Dunn 'off and on for a couple of years'", and as a result, the trial court did not abuse its discretion when it determined that Mathys held the requisite Rule 701 personal knowledge to render the opinion that Dunn was "just jealous."²⁵⁴

248. *Id.*

249. *Id.*

250. *Id.* at 612.

251. IND. R. EVID. 602.

252. IND. R. EVID. 701.

253. *Dunn*, 919 N.E.2d at 612.

254. *Id.* at 612-13. Although not challenged, the Indiana Court of Appeals also held that the voicemail message was helpful to determine if Dunn acted in self-defense. *Id.* at 613.

In *Indiana Farmers Mutual Insurance Co. v. North Vernon Drop Forge, Inc.*,²⁵⁵ Indiana Farmers Mutual Insurance Company (“insurer”) brought a declaratory judgment action against its insureds seeking a declaration that it had no duty to defend them in a third-party, multi-count action regarding contaminated dirt fill obtained from the insured’s steel forge.²⁵⁶ The trial court granted the insured party’s summary judgment motion based in part on the affidavit of the insured forge owner that he did not know the dirt was contaminated.²⁵⁷ The Indiana Court of Appeals affirmed in part and reversed in part the trial court’s summary judgment entry for the insureds, holding that:

(1) the forge owner’s affidavit testimony may be considered along with the underlying complaint when assessing the insurer’s duty to defend, (2) the factual allegations sufficiently disclose an unintended “occurrence” requiring the insurer to defend in the underlying suit, (3) coverage is not foreclosed by the policy’s intentional acts exclusion, (4) the insurer was not prejudiced by untimely notice of occurrence, and (5) the trial court erroneously ordered indemnification before the conclusion of the underlying litigation.²⁵⁸

The insureds alleged that the trial court improperly considered the forge owner’s affidavit in resolving the case. As to the affidavit, the court of appeals found that the owner

submitted his affidavit in support of the . . . [insureds’] motion for summary judgment. . . . [He] testified to his understanding of the underlying events, and he claimed that he did not know . . . [the] fill dirt was contaminated. The purpose of the affidavit was to show that the alleged wrongdoing in the case was an “accident” within the purview of . . . [the] insurance policy.²⁵⁹

The insureds objected in part to the affidavit on various evidentiary grounds, arguing that it contained “both inadmissible hearsay and unfounded statements as to the intent of other persons.”²⁶⁰ As to the Rule 602 issue, the Indiana Court of Appeals agreed with the insureds that the affiant lacked the requisite personal knowledge “to testify . . . [as to other] employees’ intentions.”²⁶¹ However, the court went on to hold the statements in the affidavit were not inadmissible hearsay because they merely provided the trial court with the affiant’s knowledge and beliefs with regards to the fill dirt when the insureds provided it to the third party—the affidavit was to show that he “believed there was nothing wrong with it” and that he “had no idea at the time . . . that allowing . . . [the insureds’] fill

255. 917 N.E.2d 1258 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 796 (Ind. 2010).

256. *Id.* at 1262-63.

257. *Id.* at 1263.

258. *Id.*

259. *Id.* at 1267.

260. *Id.* at 1269.

261. *Id.* at 1270.

dirt being placed upon . . . [the third party's] property would violate the law.”²⁶²

In *Capital Drywall Supply, Inc. v. Jai Jagdish, Inc.*,²⁶³ defendant and cross-claimant Old Fort Building Supply Company (“Old Fort”) moved for summary judgment, seeking to foreclose on a mechanic’s lien.²⁶⁴ In response to a cross-motion for summary judgment by co-defendants Jai Jagdish, Inc. (“JJI”) and Ranjan Amin (“Amin”), Old Fort designated the affidavit of employee Pamela Hartman. Paragraphs 6 and 7 of the affidavit stated that records of the St. Joseph County Auditor’s office indicated that Amin was the record owner of the real estate at issue and that Hartman had “verified that information with the Area Plan Commission because the [r]eal [e]state was in the process of being annexed.”²⁶⁵ In fact, JJI, not Amin, was the true record owner at the time that Old Fort filed the lien. The trial court declined to grant JJI and Amin’s motion to strike paragraphs 6 and 7 of the affidavit as inadmissible hearsay. But the court did limit the paragraphs to serving as evidence that Hartman had made the contacts alleged, not as evidence of the information the contacts allegedly provided.²⁶⁶

On appeal, Old Fort argued that while the affidavit could not be admitted as proof that Amin was the owner, the court below should have admitted it as evidence that Old Fort acted “reasonably and diligently” in obtaining the record owner’s name.²⁶⁷ The court of appeals, however, concluded that such evidence would not have aided Old Fort in complying with the statutory requirement that the lien notice contain the true record owner’s name. Thus, even if the trial court erred in limiting the use of the affidavit, this error had no effect on the court’s ultimate denial of Old Fort’s summary judgment motion.²⁶⁸

B. Requirement of Oath or Affirmation—Rule 603

Rule 603 governs the oath or affirmation requirement to be satisfied before a witness testifies. Rule 603 provides:

Before testifying, every witness shall swear or affirm to testify to the truth, the whole truth, and nothing but the truth. The mode of administering an oath or affirmation shall be such as is most consistent with, and binding upon the conscience of the person to whom the oath is administered.²⁶⁹

This rule “embodies a pre-existing Indiana statute,” Indiana Code section 34-45-1-2.²⁷⁰ Section 34-45-1-2 provides: “Before testifying, every witness shall be

262. *Id.*

263. 934 N.E.2d 1193 (Ind. Ct. App. 2010).

264. *Id.* at 1195.

265. *Id.* at 1195-96, 1198 (citation omitted).

266. *Id.* at 1198.

267. *Id.* at 1198-99.

268. *Id.* at 1199.

269. IND. R. EVID. 603.

270. ROBERT L. MILLER, JR., 13 INDIANA PRACTICE SERIES, INDIANA EVIDENCE § 603.101, at

sworn to testify the truth, the whole truth, and nothing but the truth. The mode of administering an oath must be the most consistent with and binding upon the conscience of the person to whom the oath may be administered.”²⁷¹ Indiana’s trial courts have consistently held that a witness’s failure to adhere to the statutory requirement that testimony be given under oath or affirmation may be waived by failing to object.²⁷² Indiana’s appellate courts did not issue any published opinions of significance on this evidentiary rule during the survey period examined in this Article.

C. Inquiry as to Validity of Verdict—Rule 606

Under Rule 606(b), a juror may testify to the validity of a verdict to determine “whether any outside influence was improperly brought to bear upon” a member of the jury.²⁷³ Indiana’s appellate courts did not issue any published opinions of significance on this evidentiary rule in the survey period examined in this Article.

D. Evidence of Character and Conduct of Witness—Rule 608

In *Nunley v. State*, Nunley appealed his conviction of four counts of felony child molesting and one count of felony dissemination of matter harmful to minors, claiming in part that the trial court committed reversible error when it excluded evidence that the six-year-old victim “made a false accusation to the police on another occasion.”²⁷⁴ Nunley asserted that this evidence should be admissible to impeach the victim’s testimony of the alleged actions at issue in his case. The Indiana Court of Appeals held that “Nunley sought to impeach . . . [the victim] by a specific act of misconduct that did not result in a criminal conviction, and therefore, the trial court correctly excluded the evidence under . . . [Rule 608(b)].”²⁷⁵

70 (3d ed. 2007).

271. IND. CODE § 34-45-1-2 (2011).

272. See *Sweet v. State*, 498 N.E.2d 924, 926 (Ind. 1986) (holding that the statutory requirement under Indiana Code section 34-1-14-2 that “every witness be sworn to testify the truth, the whole truth, and nothing but the truth . . . can be waived by the parties . . . if no objection is made” and holding that there was no objection), *superseded by rule as stated in* *Wrinkles v. State*, 749 N.E.2d 1179 (Ind. 2001); *Pooley v. State*, 62 N.E.2d 484, 485 (Ind. Ct. App. 1945) (en banc) (holding that “[t]he statutory requirement that . . . ‘every witness shall be sworn’ . . . can be waived by the parties and if no objection is made to a witness testifying without being so sworn such waiver will be presumed” (internal citation omitted)).

273. IND. R. EVID. 606(b)(3).

274. *Nunley v. State*, 916 N.E.2d 716, 720 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 787 (Ind. 2010) (noting that the victim’s mother “had been the victim of a domestic altercation with her boyfriend” and that the six-year-old “initially told the police . . . [that the boyfriend] had also attacked her, but she later recanted this statement”).

275. *Id.* The Indiana Court of Appeals ultimately reversed Nunley’s conviction in part and reversed it in part on other grounds. *Id.* at 722-23.

E. Impeachment by Evidence of Conviction of Crime

In *Allied Property & Casualty Insurance Co. v. Good*,²⁷⁶ Good alleged that Allied breached her homeowner's policy by failing to pay her insurance claim following a fire that destroyed her home and violated its duty to act in good faith regarding her claim. Before trial, the trial court granted Good's motion in limine to limit testimony at trial as to her husband's criminal history.²⁷⁷ The trial court granted Good's motion for mistrial and sanctioned Allied for violating the order in limine and causing the mistrial.²⁷⁸ On this interlocutory appeal, the Indiana Court of Appeals affirmed the trial court's decision—by extension, the propriety of the order in limine excluding testimony at trial of Good's husband's criminal history because the husband's conviction for at least one theft thirty years prior to the fire was inadmissible pursuant to the time limit enumerated in Rule 609(b).²⁷⁹

F. Prior Inconsistent Statements—Rule 613

In *Jackson v. State*,²⁸⁰ defendant Jackson was convicted of battery resulting in serious bodily injury. On appeal, he argued that the trial court erred in excluding the testimony of a paramedic. The paramedic reported that a bystander offered an alternative account of how Jackson's alleged victim, Roberts, had suffered the fatal injuries attributed to Jackson.²⁸¹ Rule 613 allows the use of a prior inconsistent statement which would otherwise qualify as hearsay to impeach a witness.²⁸² Critically, the rule allows the admission of prior inconsistent statement made *by the witness*. In the case at bar, Jackson attempted to use the paramedic's testimony of the bystander's statement to impeach Smith, who provided eyewitness testimony that Jackson had beaten Roberts. Thus, Rule 613 did not apply, as the "prior inconsistent statement" was not Smith's.²⁸³

G. Jury Questions of Witnesses—Rule 614

Indiana's appellate courts did not issue any published opinions of significance on this evidentiary rule during the survey period examined in this Article.

276. 919 N.E.2d 144 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 789 (Ind. 2010).

277. *Id.* at 146-47.

278. *Id.* at 146.

279. *Id.* at 150-51.

280. 925 N.E.2d 369 (Ind. 2010), *reh'g denied*.

281. *Id.* at 374-75. The court of appeals also held that the paramedic's account of the bystander's statement failed to qualify as a statement made for purposes of medical diagnosis or treatment under Rule 803(4). *Id.* at 375.

282. IND. R. EVID. 613(b).

283. *Jackson*, 925 N.E.2d at 375.

H. Separation of Witnesses—Rule 615

In *Williams v. State*,²⁸⁴ Williams appealed his conviction of strangulation and battery, in part asserting that the trial court erred when it denied his motion for separation of witnesses.²⁸⁵ Affirming the convictions, the Indiana Court of Appeals held that the rebuttable presumption of prejudice mandated by Rule 615 had been overcome. Nothing in the record even suggested that Williams actually suffered prejudice from the trial court's denial of his motion for separation of witnesses.²⁸⁶ "Williams'[s] defense [at trial], that he was not . . . [the victim's] attacker, was addressed by the 9-1-1 tape, [the victim's] . . . extensive testimony, and a supplementary offense report prepared by one of the FWPd detectives and offered by Williams as a defense exhibit."²⁸⁷ Thus, the violation of Rule 615 denying Williams's motion was harmless error.²⁸⁸

I. Bias of Witness—Rule 616

In *Brown-Day v. Allstate Insurance Co.*, the Indiana Court of Appeals held that the trial court erred when limiting the scope of cross-examination to be conducted by Brown-Day of Allstate's expert on the issue of damages.²⁸⁹ The result was to eliminate any reference to insurance or the fact that the defending insurance company paid the expert's fees. The trial court limited the scope of the examination, citing Rule 616.²⁹⁰ Rule 616 provides: "For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible."²⁹¹ The Indiana Court of Appeals rejected the trial court's expansion of Rule 616, holding that "evidence of bias, prejudice, or interest of a witness for or against a party is admissible, and the rule may not be disregarded on grounds that the party involved is an insurance carrier."²⁹²

In *Tolliver v. State*,²⁹³ Tolliver appealed his conviction of murder and the finding that he was a habitual offender, asserting in part that the trial court erred by "prohibiting defense counsel from inquiring into certain State's witnesses' possible bias or ulterior motives on cross-examination."²⁹⁴ Tolliver's counsel wanted to impeach two of the State's witness, Henry and Bailey, using their recent arrest and conviction records, respectively, in order to illuminate their

284. 924 N.E.2d 121 (Ind. Ct. App. 2009), *trans. denied*, 940 N.E.2d 825 (Ind. 2010).

285. *Id.* at 125.

286. *Id.* at 126.

287. *Id.* at 127.

288. *Id.* at 127.

289. *Brown-Day v. Allstate Ins. Co.*, 915 N.E.2d 548, 553-54 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 791 (Ind. 2010).

290. *See id.* at 553.

291. IND. R. EVID. 616.

292. *Brown-Day*, 915 N.E.2d at 554.

293. 922 N.E.2d 1272 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 794 (Ind. 2010).

294. *Id.* at 1275.

“potential motivations for testifying, especially given both witnesses’ recent arrests and the possibility of an accompanying deal for testifying.”²⁹⁵ The record did not include any evidence of deals being provided to Henry or Bailey in exchange for their testimony. As a result, affirming Tolliver’s conviction, the Indiana Court of Appeals held that the trial court did not abuse its discretion when it excluded the potential cross-examination because Tolliver failed to introduce any evidence “that charges were being withheld or used in consideration for testimony in the instant trial.”²⁹⁶

VII. OPINIONS AND EXPERT TESTIMONY (RULES 701-705)

A. *Opinion Testimony by Lay Witness—Rule 701*

Rule 701 limits lay opinion testimony to opinions that are: “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.”²⁹⁷ Indiana’s appellate courts did not issue any published opinions of significance on this evidentiary rule in the survey period examined in this Article.

B. *“Skilled Witness” Testimony—Rule 701*

Pursuant to Rule 701, a skilled witness may provide an opinion or inference that is “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.”²⁹⁸ “A skilled witness is a person with ‘a degree of knowledge short of that sufficient to be declared an expert under . . . Rule 702, but somewhat beyond that possessed by the ordinary jurors.’”²⁹⁹

In *Tolliver v. State*,³⁰⁰ Tolliver asserted that the trial court committed reversible error when it allowed a police officer to testify as a “skilled witness” about another witness’s “body language at the time he made certain statements.”³⁰¹ On this issue of first impression, the Indiana Court of Appeals joined with the Seventh Circuit and the Illinois Court of Appeals, stating,

We are similarly skeptical of body language testimony and join those courts in expressing our disapproval of such evidence. We must therefore conclude that the trial court’s finding . . . [of the police officer] to be a “skilled witness” who was somehow “uniquely qualified” to assess . . . [another witnesses’s] truthfulness [akin to a human lie

295. *Id.* at 1285.

296. *Id.* at 1285-86 (citation omitted).

297. IND. R. EVID. 701.

298. *Id.*

299. *Kubsch v. State*, 784 N.E.2d 905, 922 (Ind. 2003) (quoting ROBERT L. MILLER, JR., 13 INDIANA PRACTICE SERIES, INDIANA EVIDENCE § 701.105, at 318 (2d ed. 1995)).

300. 922 N.E.2d 1272 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 794 (Ind. 2010).

301. *Id.* at 1278 (citation omitted).

detector] was error.³⁰²

Yet the Indiana Court of Appeals also found the error to be harmless and affirmed Tolliver's conviction.³⁰³

In *Romo v. State*,³⁰⁴ the Indiana Court of Appeals held that the trial court did not err in admitting a police detective's opinion testimony regarding narcotics trafficking. The court rejected the defendant's assertion that the State failed to establish a proper foundation for the detective's testimony as a skilled witness or as an expert witness.³⁰⁵ To the contrary, the detective satisfied the requirements of Rule 701 in that his testimony was "rationally based" on his general experience and training and experience as a police officer and member of the drug task force and because "he possesse[d] knowledge beyond that of the average juror with regard to the dealing of narcotics."³⁰⁶

C. Reliability of Scientific Principles Underlying Opinion—Rule 702(b)

Under Rule 702(b), expert scientific testimony is admissible where the court is satisfied that the scientific principles underlying the testimony are reliable.³⁰⁷ In *Spaulding v. Harris*,³⁰⁸ prior to trial, the estate of deceased plaintiff Spaulding had obtained an opinion from an Indiana Department of Insurance medical review panel under the Indiana Medical Malpractice Act.³⁰⁹ Pursuant to Indiana Code section 34-18-10-23 and Rule 702, a doctor on the panel testified as an expert for Spaulding. The trial court excluded portions of the doctor's testimony based upon a medical article that she had reviewed.³¹⁰ The court noted that

[a]n expert witness can draw upon all sources of information coming to his knowledge or through the results of his investigation in order to reach a conclusion. An expert may rely on hearsay when she uses other experts and authoritative sources of information like treatises to aid her in rendering an opinion.³¹¹

As a result, the Indiana Court of Appeals held that the trial court erred when it excluded this evidence. Nevertheless, the court held the trial court's error to be harmless because the excluded testimony was cumulative.³¹² The court ultimately affirmed the trial court's entry of judgment on the verdict in favor of the

302. *Id.* at 1279.

303. *Id.* at 1286.

304. 929 N.E.2d 805 (Ind. Ct. App. 2010), *aff'd*, 941 N.E.2d 504 (Ind. 2011).

305. *Id.* at 812.

306. *Id.*

307. IND. R. EVID. 702(b).

308. 914 N.E.2d 820 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 788 (Ind. 2010).

309. *Id.* at 825, 828.

310. *Id.* at 825.

311. *Id.* at 829 (citations omitted).

312. *Id.* at 829-30.

defendants in this case.³¹³

*Bennett v. Richmond*³¹⁴ addressed the extent to which a psychologist is qualified to present expert testimony regarding the medical cause of a brain injury. In 2004, plaintiff Richmond suffered neck and back injuries when defendant Bennett rear-ended the plaintiff's van.³¹⁵ Later the same year, the plaintiff suffered a work injury that exacerbated the injuries he sustained in the accident with Bennett. After his 2006 neuropsychological examination of the plaintiff, Dr. McCabe, a psychologist, concluded that Richmond suffered from a traumatic brain injury and that the injury had resulted from Richmond's accident with Bennett.³¹⁶ Over the defendant's objection that Dr. McCabe failed to qualify as competent to testify as to medical diagnosis, the trial court allowed Dr. McCabe's testimony as to the existence and medical causation of Richmond's alleged brain injury. Specifically, the trial court cited Rule 702(b), which provides that "[e]xpert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable."³¹⁷ The trial court found that McCabe's lack of a medical degree "in itself . . . [did] not undermine the scientific principles upon which McCabe might offer an opinion" and that the plaintiff had "presented a good case that McCabe's testimony could be based upon sound scientific principles and aid the trier of fact in assessing the case."³¹⁸

The court of appeals disagreed. While it refused to issue a blanket rule that psychologists stand as unqualified to offer testimony as to the etiology of brain injuries, it noted that there was no evidence that Dr. McCabe had the requisite education or training to make such determinations.³¹⁹ Although Dr. McCabe appeared qualified to testify that Richmond had "sustained a brain injury from an unknown cause . . . Dr. McCabe's testimony went too far in identifying the May 2004 accident as the cause of Richmond's alleged brain injury."³²⁰ Moreover, "even if Dr. McCabe were qualified to give causation testimony in this case, his testimony was lacking in probative value" because it failed to explain how the impact of the particular accident "might have resulted in Richmond's brain damage."³²¹ Instead, McCabe based his conclusion regarding causation on an inferential analysis—namely, that Richmond's symptoms of brain injury arose after the accident. Thus, his opinion was not the proper subject of expert testimony. And because there was no admissible evidence establishing the

313. *Id.* at 833.

314. 932 N.E.2d 704 (Ind. Ct. App. 2010), *trans. granted, opinion vacated*. The Indiana Supreme Court has granted transfer; therefore, the court of appeals' decision has been vacated. The supreme court's ruling is forthcoming.

315. *Id.* at 706.

316. *Id.* at 706-07.

317. *Id.* at 707 (citing IND. R. EVID. 702).

318. *Id.* at 708.

319. *Id.* at 710 n.3.

320. *Id.* at 710.

321. *Id.* at 711.

accident as the cause of the plaintiff's injury, the remainder of McCabe's testimony was irrelevant under Rule 402.³²² Finally, the admission of McCabe's testimony establishing causation was not harmless error and thus warranted reversal.³²³

Similarly, in *Nasser v. St. Vincent Hospital & Health Services*,³²⁴ the Indiana Court of Appeals held that summary judgment for the defendant on the plaintiff's medical malpractice claim was warranted, as the only evidence the plaintiff designated on the issue of causation was the affidavit of Margaret Busacca, a registered nurse.³²⁵ Bussaca served on the medical review panel charged with evaluating Nasser's proposed complaint; she was the lone member of the panel to find that the defendant "failed to meet the applicable standard of care."³²⁶

In determining whether Bussaca's affidavit created a genuine issue of material fact on the issue of causation, the court looked closely at the Indiana Medical Malpractice Act, which provides for the establishment of medical review panels to review proposed medical malpractice complaints.³²⁷ Under the Act, "[a] medical review panel consists of one (1) attorney and three (3) health care providers"—including physicians, dentists, registered nurses, licensed practical nurses, physician assistants, mid-wives, psychologists, and chiropractors, among other professionals.³²⁸ The panel's "sole duty" is to provide an "expert" opinion on "whether the evidence supports the conclusion that the defendant(s) acted or failed to act within the appropriate standard(s) of care as charged in the . . . [proposed] complaint."³²⁹

The court noted that under its 1998 decision in *Long v. Methodist Hospital of Indiana, Inc.*,³³⁰ to which the trial court paid great deference in granting summary judgment to defendants, nurses "are not qualified to offer expert testimony as to the medical cause of injuries."³³¹

Though the *Long* court did not base its holding on Rule 702 explicitly, its holding implied that nurses fail to satisfy the requirements of Rule 702(a)—specifically, that expert witnesses are qualified by "*knowledge, skill, experience, training, or education*"³³²—to offer specialized testimony. The court then resolved the conflict between Rule 702 (and the *Long* decision) and Indiana Code section 34-18-10-23, under which the opinion of a nurse who serves on a medical review panel and offers a minority opinion is sufficient to create a

322. *Id.* at 711-12.

323. *Id.* at 712.

324. 926 N.E.2d 43 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 822 (Ind. 2010).

325. *Id.* at 48.

326. *Id.* at 46.

327. *Id.* at 49.

328. IND. CODE §§ 34-18-10-3 (2011); *see also id.* § 34-18-2-14(1).

329. *Nasser*, 926 N.E.2d at 43 (citing IND. CODE § 34-18-10-22(a)).

330. 699 N.E.2d 1164 (Ind. Ct. App. 1998).

331. *Nasser*, 926 N.E.2d at 46, 50-52 (citing *Long*, 699 N.E.2d at 1169).

332. IND. R. EVID. 702(a).

genuine issue of material fact on summary judgment.³³³ It explained that “[w]hen there is a conflict between a statute and a rule of evidence, the rule of evidence prevails.”³³⁴ Thus, in the case at bar, the trial court was correct in granting summary judgment, as the plaintiff designated no evidence other than Busacca’s affidavit on the issue of causation.

A different Indiana Court of Appeals panel reached a similar holding in *Clarian Health Partners, Inc. v. Wagler*,³³⁵ reversing the trial court’s decision to deny summary judgment to defendant Clarian. It held that a nurse’s affidavit was inadmissible as expert opinion on the issue of causation.³³⁶ The court found no conflict between its holding in *Long*—that nurses lack the requisite qualifications to provide expert opinions on the issue of medical causation—and its holding in *Harlett v. St. Vincent Hospitals & Health Services*,³³⁷ where it concluded that “*Long* could not be *expanded* to the issue of whether a nurse could be a member of a medical review panel.”³³⁸

E. Rule 702(b) Challenges in the Midst of Trial

In *Wilkes v. State*,³³⁹ Wilkes appealed his conviction of a triple murder and the death sentence imposed as the penalty for said crimes asserting in part that the trial erred when it admitted phenolphthalein test results—“a stain from Wilkes’s shoe . . . tested ‘presumptive’ for blood using a phenolphthalein test”—asserting that “the State did not lay a foundation explaining the test’s reliability.”³⁴⁰ Rule 702(b), governing “the admissibility of expert scientific testimony . . . provides that expert scientific testimony is admissible only if ‘the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.’”³⁴¹ The Indiana Supreme Court held that the trial court did not abuse its discretion in admitting this evidence because Wilkes’s argument that the stain was not definitively identified as blood was meritless, stating:

Whether . . . [the stain] was from blood or another source, [the victim] . . . died from over twenty blows that left not only her blood but also other tissue on a weapon found at this horrific scene. Second, and equally important, to the extent there was any significance to whether the stain was blood rather than some other biological material bearing . . . [the victim’s] DNA, the State’s witness explained that the test was only presumptive and required confirmation to establish conclusively that the

333. See IND. CODE § 34-18-10-23.

334. *Nasser*, 926 N.E.2d at 52 (citing *Humbert v. Smith*, 664 N.E.2d 356, 357 (Ind. 1996)).

335. 925 N.E.2d 388 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 822 (Ind. 2010).

336. *Id.* at 398-99.

337. 748 N.E.2d 921 (Ind. Ct. App. 2001).

338. *Id.*

339. 917 N.E.2d 675 (Ind. 2009), *reh’g denied*, *cert. denied*, 131 S. Ct. 414 (2010).

340. *Id.* at 685.

341. *Id.* (quoting *Malinski v. State*, 794 N.E.2d 1071, 1084 (Ind. 2003) (stating that reliability of a test may be established by judicial notice or by a sufficient foundation to establish reliability)).

stain was in fact blood.³⁴²

Accordingly, affirming Wilkes's conviction and death sentence, the Indiana Supreme Court held that the trial court properly admitted this evidence.³⁴³

In *Lees Inns of America, Inc. v. William R. Lee Irrevocable Trust*,³⁴⁴ after minority shareholders dissented to a merger in which they were bought out, the corporation filed a petition for determination of fair value. The minority shareholders counterclaimed for breach of fiduciary duty and fraud, and after the trial court entered judgment in their favor, cross-appeals ensued.³⁴⁵ The Indiana Court of Appeals affirmed the judgment entered by the trial court, holding in part that Lees Inns failed to preserve for appeal the trial court's ruling on the admissibility of the minority shareholders' experts' opinion in accordance with Rule 702(b).³⁴⁶ Lees Inns failed to object to the admissibility of the testimony and "extensively cross-examined the expert witnesses about . . . [their expert] report at trial"; therefore, "Lees Inns . . . [was] precluded from asserting for the first time on appeal that the trial court should have disregarded the report and expert testimony on the basis that the . . . [experts'] appraisal was merely speculative."³⁴⁷

In *Bond v. State*,³⁴⁸ the defendant challenged his conviction for car theft and altering a vehicle's original identification number on several bases, including that the trial court erred in admitting expert testimony regarding the presence of the defendant's fingerprints on the vehicle in question. The defendant did not attack the expert's qualifications or assert that the fingerprint identification method she used—"Analyze, Compare, Evaluate, and Verify (ACE-V)"—did not meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*³⁴⁹ Instead, he claimed that police failed to follow the ACE-V method and that the State failed to present the testimony of the verifying print examiner. The State presented the testimony of the technician ("Frick") who found the defendant's prints in the car and the examiner ("Klosinski") who determined that the prints were the defendant's, thereby violating his confrontation rights. As to the Rule 702 issue, whether the method was followed, the court of appeals found that the issue was a preliminary question for the trial court under Rule 104(a), and therefore, Klosinski's testimony regarding the steps involved in ACE-V and her adherence to them stood sufficient to render her opinion on the defendant's prints admissible.³⁵⁰ The court also held that the Confrontation Clause did not demand

342. *Id.* at 686.

343. *Id.*

344. 924 N.E.2d 143 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 821 (Ind. 2010).

345. *Id.* at 147-48.

346. *Id.* at 155 (citing *Franciose v. Jones*, 907 N.E.2d 139, 145 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009)).

347. *Id.*

348. 925 N.E.2d 773 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 823 (Ind. 2010).

349. *Id.* at 778 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)).

350. *Id.* at 780-81.

that the “verifier” who analyzed the defendant’s latent prints be called to testify.³⁵¹

F. Opinions as to Legal Conclusions—Rule 704

In *Wilkes v. State*,³⁵² the Indiana Supreme Court held that the trial court erred under Rule 704(b) when it allowed a police officer to testify at trial regarding his opinion as to Wilkes’s guilt for the triple murder at issue in this case. Yet the Indiana Supreme Court found the error to be harmless in light of the forensic evidence and confessions supporting Wilkes’s guilt.³⁵³

VIII. HEARSAY (RULES 801-806)

A. Out-of-Court Statements Generally—Rule 801

In *Treadway v. State*,³⁵⁴ the Indiana Supreme Court held that the trial court had properly overruled the defendant’s hearsay objection to its admission of portions of a transcript of the defendant speaking to police in Minnesota while he was under arrest for a separate crime.³⁵⁵ Specifically, the defendant objected to the fact that the transcribed statement was admitted without the redaction of questions asked by one of the Minnesota police officers whom interviewed him. The court noted that the officer’s questions were made to elicit a response from the defendant and were not offered for the truth of the matter asserted; thus, they fell outside the definition of hearsay provided by Rule 801(c).³⁵⁶ Similarly, in *Williams v. State*,³⁵⁷ in which the defendant challenged his conviction for a variety of drug crimes on Confrontation Clause grounds, the Indiana Court of Appeals held that recorded statements made by a confidential informant as part of a conversation with the defendant did not constitute hearsay, as they were offered to provide context, not for the truth of the matter asserted.³⁵⁸

In *Diaz v. State*,³⁵⁹ during a post-conviction evidentiary hearing, defendant Diaz presented the expert testimony of Christina Courtright, an interpreter for the Indiana courts, to demonstrate that the interpreting during Diaz’s guilty plea hearing was flawed.³⁶⁰ Courtright intended to use a chart comparing what the court had said during Diaz’s hearing and the English equivalent of what the interpreter said in Spanish. The post-conviction court sustained the State’s

351. *Id.* at 781.

352. 917 N.E.2d 675 (Ind. 2009), *reh’g denied*, *cert. denied*, 131 S. Ct. 414 (2010).

353. *Id.* at 686.

354. 924 N.E.2d 621 (Ind. 2010).

355. *Id.* at 635-36.

356. *Id.*

357. 930 N.E.2d 602 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 826 (Ind. 2010).

358. *Id.* at 608.

359. 934 N.E.2d 1089 (Ind. 2010).

360. *Id.* at 1093-94.

hearsay objection to the chart, and the Indiana Court of Appeals affirmed.³⁶¹ The Indiana Supreme Court, however, held that the post-conviction court erred in excluding Courtright's chart, which was a demonstrative exhibit, not hearsay, and remanded to the trial court for a determination of whether Diaz's plea was voluntary.³⁶²

B. Indiana's Protected Person Statute³⁶³ and Rule 802

Indiana's appellate courts did not issue any published opinions of significance on this evidentiary rule in the survey period examined in this Article.

C. Prior Consistent Statements—Rule 801(d)(1)(B)

Ordinarily, an out-of-court statement offered for the truth of the matter asserted would qualify as inadmissible hearsay under Rule 801(c). Rule 801(d)(1)(B), however, provides an exception from this general rule where

[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony, offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, and made before the motive to fabricate arose.³⁶⁴

In *Lovitt v. State*,³⁶⁵ Lovitt appealed his felony convictions of maintaining a common nuisance, possession of marijuana, possession of paraphernalia, and operating a vehicle while intoxicated, asserting in part that the trial court abused its discretion when it excluded a witness's testimony at trial. Lovitt proffered the following testimony, which the trial court excluded:

Lovitt's girlfriend[] was a passenger in Lovitt's vehicle during the . . . [traffic stop that led to Lovitt's arrest]. At trial, both Lovitt and . . . [his girlfriend] testified that Officer Smith initiated the traffic stop immediately after Lovitt passed the officer's vehicle, and the officer could not have observed any erratic driving behavior or traffic violations. Over the State's objection, Lovitt offered the testimony of . . . [Crouch], who would have testified that . . . [his girlfriend] told her that Officer Smith pulled Lovitt's vehicle over immediately after Lovitt passed the officer.³⁶⁶

Lovitt offered Crouch's testimony to bolster his girlfriend's testimony concerning the events that led to his arrest. Relying on Rule 801(d)(1)(B), "Lovitt claim[ed] that '[n]ot allowing Crouch's testimony bolstered the State's case, leading the

361. *Id.* at 1093.

362. *Id.* at 1094.

363. IND. CODE § 35-37-4-6 (2011).

364. IND. R. EVID. 801(d)(1)(B).

365. 915 N.E.2d 1040 (Ind. Ct. App. 2009).

366. *Id.* at 1042 (internal citation omitted).

jury to believe [Officer] Smith over . . . [his girlfriend], and caused prejudice to Lovitt.”³⁶⁷ The Indiana Court of Appeals ultimately decided that it could not

conclude that it [was] likely that Crouch’s testimony would have led the jury to find Lovitt’s and . . . [his girlfriend’s] version of events credible. Furthermore, Lovitt admits that he cannot deny “that because of the damaging statements that Lovitt chose to make against himself, that many of the counts would result in a guilty finding.” Even if the jury believed Lovitt and . . . [his girlfriend], the evidence was still sufficient to convict Lovitt of possession of marijuana, possession of paraphernalia, and operating while intoxicated. Therefore, any error in the exclusion of Crouch’s testimony was harmless.³⁶⁸

D. Excited Utterance—Rule 803(2)

In *Boatner v. State*,³⁶⁹ the defendant asserted that the trial court had erred in admitting an officer’s hearsay testimony. The officer testified that the defendant’s girlfriend, “A.J.,” told him that Boatner had pushed her down and hit her.³⁷⁰ The trial court overruled Boatner’s objection, finding the statement admissible under the “excited utterance” exception contained in Rule 803(2). The court of appeals noted that under existing precedent, three conditions were required for a hearsay statement to fall within the purview of Rule 803(2): “(1) a startling event has occurred; (2) a statement was made by a declarant while under the stress of excitement caused by the event; and (3), the statement relates to the event.”³⁷¹ Although the court noted that the closer in time the statement is made to the startling event, the more likely it is to be considered an excited utterance for Rule 803(2) purposes, the temporal relationship between the two is not necessarily dispositive.³⁷² In the present case, even though the record did not reveal the precise amount of time that elapsed between the alleged battery and A.J.’s statement to the officer, the facts and circumstances (A.J. was crying and disoriented when she told the officer about the battery) indicated that she was still under the stress of the incident when she made her statement to the officer. Thus, the trial court did not abuse its discretion in admitting the statement.³⁷³

367. *Id.* at 1043 (citation omitted).

368. *Id.* at 1044 (internal citation omitted).

369. 934 N.E.2d 184 (Ind. Ct. App. 2010).

370. *Id.* at 185.

371. *Id.* at 186 (citing *Jones v. State*, 800 N.E.2d 624, 627-28 (Ind. Ct. App. 2003)).

372. *Id.* at 186-87 (citing *Jones*, 800 N.E.2d at 627-28).

373. *Id.* at 187.

E. Statement Made for Purpose of Medical Diagnosis or Treatment—Rule 803(4)

In *Sibbing v. Cave*,³⁷⁴ Sibbing appealed the verdict for Cave in this automobile rear-end collision personal injury case, asserting that the trial court erred, at least in part, when it permitted the plaintiff to testify about what she was told by her treating physician and her own beliefs about the cause of her pain. Sibbing claimed that the same did not qualify as an exception to the hearsay rule under Rule 803(4) “since the statements at issue were made by Dr. Saquib to Cave and not by Cave to Dr. Saquib for purposes of receiving a diagnosis or treatment.”³⁷⁵ Rule 803(4) states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.³⁷⁶

The Indiana Supreme Court, disapproving of the Indiana Court of Appeals’s holding in *Coffey v. Coffey*,³⁷⁷ held that the trial court erred when it admitted Sibbing’s hearsay testimony, noting that:

[it did not comport with t]he rationale for the [Rule] 803(4) hearsay exception[, which] is that a declarant has a personal interest in obtaining a medical diagnosis and treatment, and this interest motivates the patient to provide truthful information. Stated another way, a patient’s personal interest in receiving medical treatment supplies significant indicia of reliability that the patient’s statements are true, thus reducing the need for exclusion of hearsay evidence not subject to cross-examination. Declarations made by a physician or other health care provider to a patient do not share this enhanced indicia of reliability. . . . While Rule 803(4) does not expressly identify which declarants’ medical statements are intended to be treated as a hearsay rule exception, we hold that the Rule is intended and should apply only to statements made by persons who are seeking medical diagnosis or treatment.”³⁷⁸

374. 922 N.E.2d 594 (Ind. 2010).

375. *Id.* at 597 (citation omitted). The Indiana Supreme Court also held that Sibbing’s opinion testimony about the source of her pain merely stated “her own personal belief about the source of her pain . . . [which] was permissible as testimony by a lay witness pursuant to . . . [Rule] 701.” *Id.* at 599.

376. IND. R. EVID. 803(4).

377. 649 N.E.2d 1074 (Ind. Ct. App. 1995).

378. *Sibbing*, 922 N.E.2d at 598 (citing *McClain v. State*, 675 N.E.2d 329, 331 (Ind. 1996)).

Regardless of the error in admitting this evidence, the court found the error to be harmless and not a basis for reversal of the jury's verdict.³⁷⁹

F. Business Records—Rule 803(6)

Records of regularly conducted business activities may be authenticated through the use of an affidavit from an appropriate person, rather than by a witness's in-court testimony, through the combination of Rule 803(6) and Rules 902(9) or 902(10). Indiana's appellate courts did not issue any published opinions of significance on this evidentiary rule in the survey period examined in this Article.

G. Public Records and Reports—Rule 803(8)

Fowler v. State involved Stacey Fowler's appeal of her conviction for Class B misdemeanor battery on the ground that the trial court erred in admitting her husband's booking card from a previous, unrelated arrest.³⁸⁰ The State alleged that Stacey committed battery against her husband, Ricky Fowler, in the presence of two police officers. Ricky did not appear at Stacey's trial, and the State admitted Ricky's booking card to help establish Ricky's identity as the victim. Stacey objected to the admission of the booking card on the grounds that it constituted inadmissible hearsay under Rule 801(c) and that it violated her constitutional right to confrontation.³⁸¹

The Indiana Court of Appeals disagreed that the booking card constituted inadmissible hearsay. It found that the card fell within the hearsay exception for public records, Rule 803(8).³⁸² The court quoted the text of the rule, which does not provide an exception for, among other documents, "investigative reports by police and other law enforcement personnel, except when offered by the accused in a criminal case . . ."³⁸³ The court explained that this aspect of the Rule does not "bar admission of police records pertaining to 'routine, ministerial, objective nonevaluative matters made in non-adversarial settings.'"³⁸⁴ More specifically, the court noted that other courts have held that routine police booking records fall within the ambit of the public records exception.³⁸⁵ As the court detailed, courts and commentators distinguish between investigative police reports, which are less reliable than other public records because of the "adversarial" relationship

379. *Id.* at 599.

380. *Fowler v. State*, 929 N.E.2d 875, 877 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 825 (Ind. 2010).

381. *Id.*

382. *Id.* at 879.

383. *Id.* at 878 (quoting IND. R. EVID. 803(8)).

384. *Id.* at 879 (quoting MICHAEL H. GRAHAM, 30B FEDERAL PRACTICE & PROCEDURE § 7049 (interim ed. 2006)).

385. *Id.* (citing *United States v. Dowdell*, 595 F.3d 50, 70-72 (1st Cir. 2010); *United States v. Koontz*, 143 F.3d 408, 411-13 (8th Cir. 1998)).

between the police and the accused, and booking records, for which there is little motivation other than to “mechanically register an unambiguous factual matter.”³⁸⁶

With respect to the booking information at issue in the case at bar, the court noted that the “information on the printout was obtained and recorded in the course of a ministerial, nonevaluative booking process.”³⁸⁷ Thus, it did not raise the same concerns as a police investigative report, and its admission was properly within the exception created by Rule 803(8).

H. Defining Unavailability—Rule 804(a)(3)

In *McGaha v. State*,³⁸⁸ the defendant, convicted of murdering a friend with whom he had been involved in a drug deal, argued that the trial court denied him his confrontation rights under the Indiana and United States Constitutions by admitting the deposition testimony of a medical examiner who was not present to testify at trial. The State conceded that the medical examiner was not “unavailable” under Rule 804(a)(5).³⁸⁹ The examiner was out of state attending his child’s graduation from college. Though the court concluded that this did not render the medical examiner unavailable for Confrontation Clause purposes, the State did not subpoena the medical examiner or attempt to continue the trial date; rather, it found the error harmless in light of the other evidence against McGaha.³⁹⁰

I. Dying Declaration—Rule 804(b)(2)

In *Wright v. State*,³⁹¹ the Indiana Court of Appeals examined the dying declaration exception to the hearsay rule in its review of Wright’s conviction of three counts of murder.³⁹² Wright appealed his conviction, asserting in part that the trial court erred when it allowed the introduction into evidence of one of his victim’s statements identifying him as his assailant via the dying declaration exception; he claimed that it violated his Sixth Amendment right to confrontation under *Crawford v. Washington*.³⁹³ R.A., one of Wright’s victims, dragged himself across the street to seek assistance after having been stabbed by Wright sixteen times. As he lay dying on his neighbor’s doorstep, R.A. indicated to the police that Wright had stabbed him.³⁹⁴ Pursuant to Rule 804(b), “[a]lthough generally inadmissible, hearsay is admissible under the ‘dying declaration’

386. *Id.* (quoting S. REP. No. 93-1277, at 17 (1974); *United States v. Quezada*, 754 F.2d 1190, 1194 (5th Cir. 1985)).

387. *Id.*

388. 926 N.E.2d 1050 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 819 (Ind. 2010).

389. *Id.* at 1055-57.

390. *Id.* at 1057.

391. 916 N.E.2d 269 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 781 (Ind. 2010).

392. *Id.* at 272.

393. 541 U.S. 36 (2004).

394. *Wright*, 916 N.E.2d at 273.

exception if a declarant makes a statement ‘while believing that . . . [his] death was imminent, concerning the cause or circumstances of what . . . [he] believed to be impending death.’”³⁹⁵ The Indiana Court of Appeals affirmed Wright’s conviction and held that the trial court did not abuse its discretion when it found R.A.’s statement to be an admissible *in extremis* dying declaration. The court went on to state that even if R.A.’s statement was not a dying declaration, it did not “run afoul of . . . [Wright’s] Sixth Amendment right to confrontation” because R.A.’s statements were not testimonial.³⁹⁶

J. Admissions Against Interest—Rule 804(b)(3)

In *Tolliver v. State*,³⁹⁷ Tolliver asserted that the trial court committed reversible error when it allowed into evidence the victim’s statements to other witnesses identifying Tolliver as the shooter. The trial court allowed into evidence the following statements of the victim to his mother, father, and sister, respectively, as admissions against interest because, according to the court, the statements implied that the declarant (victim) would “take care of it,” i.e., “that he would act out in violence, either committing a battery or worse”.³⁹⁸

- Victim’s Mother: Victim identified Tolliver as the shooter and said he was “going to get” Tolliver.
- Victim’s Father: Victim “identified Tolliver as the shooter”—he did not make any accompanying statements to his father.
- Victim’s Sister: Victim identified Tolliver as the shooter and said he would “handle it [him]self.”³⁹⁹

Regarding the hearsay exception, the court noted:

Statements against interest are admissible if, at the time they were made, they tended to subject the declarant to criminal liability such that a reasonable person in the declarant’s position would not have made them if he did not believe in their truth. The State concedes that, as a general matter, to qualify under this hearsay exception, the statement against interest must be incriminating on its face.⁴⁰⁰

The Indiana Court of Appeals held that the trial court committed an abuse of discretion when it admitted the testimony because (1) the testimony did not implicate the victim in a crime and (2) even if it did implicate the victim in a crime, the implicating statements “merely *accompanied* the disputed identification statements. Under the plain language of Rule 804(b)(3), the identification statements themselves must have been against . . . [the victim’s]

395. *Id.* at 275 (quoting IND. R. EVID. 804(b)(2)).

396. *Id.* at 276.

397. 922 N.E.2d 1272 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 794 (Ind. 2010).

398. *Id.* at 1279-80.

399. *Id.* (citations omitted).

400. *Id.* (internal citations omitted).

interest in order to be admissible.”⁴⁰¹ Yet the Indiana Court of Appeals also found the error to be harmless and affirmed Tolliver’s conviction.⁴⁰²

IX. AUTHENTICATION AND IDENTIFICATION (RULES 901-903)

In *Lee v. State*,⁴⁰³ Lee appealed his conviction of two counts of invasion of privacy, asserting that the trial court “abused its discretion by admitting hearsay evidence regarding the identity of the woman he was prohibited from contacting.”⁴⁰⁴ Over Lee’s objection, the trial court allowed Lee’s investigating officer to testify about the telephone conversation he had with the victim because the State argued that it “offer[ed] the evidence only to establish identity [of the victim].”⁴⁰⁵ Rule 901(a) provides that “[t]he requirement of . . . identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”⁴⁰⁶ Subsection 6 of Rule 901(b) provides an illustrative example of how to establish the condition precedent: “[t]elephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person . . . if . . . circumstances, including self-identification, show the person answering to be the one called”⁴⁰⁷ may suffice. The Indiana Court of Appeals held

that calling the number which initiated the 911 call and was shown by both the CAD system and the original police report as belonging to . . . [the victim] was the functional equivalent of establishing that it was the number assigned at the time by the telephone company to . . . [the victim]. . . . [The victim’s] response that she was . . . [the victim] and providing details concerning her four children and what had occurred with Lee satisfied the requirements of . . . [Rule] 901(b)(6) to establish her identity as being . . . [the victim].⁴⁰⁸

Moreover, Rule 901(b)(5) provides for the admission of “[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it to the alleged speaker.”⁴⁰⁹ Thus, the Indiana Court of Appeals found it proper for the investigating officer “to testify on the basis of his familiarity with . . . [the victim’s] voice, that she was the person whom Lee

401. *Id.* at 1281.

402. *Id.* at 1286.

403. 916 N.E.2d 706 (Ind. Ct. App. 2009).

404. *Id.* at 706.

405. *Id.* at 707.

406. IND. R. EVID. 901(a).

407. IND. R. EVID. 901(b)(6).

408. *Lee*, 916 N.E.2d at 707.

409. IND. R. EVID. 901(b)(5).

called and was speaking to from the jail.”⁴¹⁰

X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS
(RULES 1001-1008)

Indiana's appellate courts did not issue any published opinions of significance on this evidentiary rule during the survey period examined in this Article.

CONCLUSION

During the survey period, the Indiana appellate courts addressed a number of important evidentiary issues and continued to shape the rules of evidence in the State of Indiana. The fruits of these decisions will be invaluable in guiding practitioners over the coming year.

410. *Lee*, 916 N.E.2d at 707.

RECENT DEVELOPMENTS IN FAMILY AND MATRIMONIAL LAW

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INTRODUCTION

During the survey period, numerous Indiana appellate court decisions were published involving family and matrimonial law. These decisions will impact future cases involving topics such as dissolution of marriage, child custody, support, relocation, paternity, and adoption. The Indiana Supreme Court also issued its Order Amending Indiana Child Support Rules and Guidelines (“the Guidelines”) in 2009, with revisions to the Guidelines taking effect on January 1, 2010. Thus, this Article reviews developments in Indiana’s family and matrimonial case law during the survey period, as well as the recent amendments to the Guidelines.¹

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1. To stay current on recent developments in Indiana family law, please consider subscribing to the Indiana Family Law Update, a free service provided by the Matrimonial Law Group of Bingham McHale LLP. The Indiana Family Law Update sends select Indiana cases pertaining to family law issues, along with brief synopses and analyses, to e-subscribers as cases are released by the Indiana Supreme Court and Indiana Court of Appeals. To subscribe, send an e-mail to familylawcases@binghammchale.com with “subscribe” in the subject field or body. Further updates on developments in Indiana family law are available through the Bingham McHale blog, *available at* <http://blog.binghammchale.com/c/departments/private-client/>.

I. DISSOLUTION OF MARRIAGE

The following section reviews noteworthy cases involving marital property issues, property valuation issues, distribution issues, and other matters related to the dissolution of marriage.

A. Property Distribution

Distributing marital property raises issues involving how to define the marital estate, how to value marital property, and how to distribute marital property.

1. *What Should Be Included in the Marital Estate?*—Several cases during the survey period address the issue of whether property is includable in the marital estate.

a. *Vested right to receive future employer-provided health constitutes a marital asset.*—In *Bingley v. Bingley*,² the Indiana Supreme Court considered whether the vested right to receive future employer-provided health insurance benefits constitutes a marital asset subject to division in divorce proceedings.

At the time of the dissolution proceeding in *Bingley*, the husband received a retiree benefit in the form of health insurance premiums, paid by his former employer, for the remainder of his life. The payments were a non-elective benefit for the husband as a retiree and were not subject to divestiture, division, or transfer. The husband could not have elected to receive a larger monthly pension payment in lieu of the health insurance premium payments. The trial court entered its dissolution decree, concluding that the benefit was not a marital asset subject to division.³ The wife appealed, arguing that these benefits are property as defined by Indiana Code section 31-9-2-98(b)⁴ and citing a line of Indiana cases holding that pension benefits are marital assets.⁵ The Indiana Court of Appeals affirmed the trial court's decision that the benefit was not a marital asset, but the Indiana Supreme Court granted transfer.

On transfer, the Indiana Supreme Court reviewed Indiana's broad statutory definition of marital "property." The court also focused on the concept of "vesting" in determining whether a disputed item constitutes marital property, noting that "vesting is both a necessary and sufficient condition for a right to a benefit to constitute an asset."⁶ In the instant case, there was no dispute that the husband's right to receive future health insurance benefits from his former employer was not subject to divestiture.

The court rejected the husband's argument that the health insurance benefits were not an asset because he could not transfer or alienate them, and because the value of the benefits was speculative.⁷ Although the court agreed that these

2. 935 N.E.2d 152 (Ind. 2010).

3. *Id.* at 154.

4. IND. CODE § 31-9-2-98(b)(2) (2011) (defining "property" as "the right to receive pension or retirement benefits that are not forfeited upon termination of employment or that are vested").

5. *See Bingley*, 935 N.E.2d at 155.

6. *Id.* at 155.

7. *Id.* at 156-57.

characteristics of the asset could present challenges to a trial court in dividing the overall marital estate, it did not alter the benefits' status as a marital asset.⁸ The court also provided some general guidance on how such benefits might be valued, underscoring that valuation rests with the discretion of the trial court. Finally, the court noted that the husband's argument that his health care benefits were illiquid and subject to risk "[might] be sufficient grounds" for the trial court to deviate in the husband's favor in the overall division of the marital estate.⁹ The trial court's decree was reversed, and the matter was remanded for further proceedings that included the valuation of the husband's benefit and reconsideration of the overall division of the marital estate.

Justice Dickson dissented in *Bingley* to share his belief that Indiana's statutory definition of "property" is narrower than the majority construed it.¹⁰ He also expressed public policy concerns about the number of people, especially in the military, who receive lifetime health care benefits that could be implicated by the court's decision: "The resulting inclusion of its present value as marital property would likely preclude a divorcing military retiree from retaining any other marital property . . . I seriously doubt that our legislature intended such potentially catastrophic results."¹¹ Justice Dickson was also concerned that the court's holding could be easily expanded to non-monetary future benefits that are difficult to value—for instance, a retired automobile manufacturer's right to future car discounts or a former airline employee's right to future free flights.¹²

b. Real estate held as a life estate should not be included in the marital estate.—In *Leever v. Leever*,¹³ the Indiana Court of Appeals considered whether the trial court erred when it placed certain real estate into a constructive trust instead of assigning the real estate a value and including it in the marital estate.

In *Leever*, the husband and wife were married in 1977, and the wife filed a petition for dissolution in 2007.¹⁴ In 1999, the husband's parents ("Parents") had quitclaimed their home to the husband and wife.¹⁵ Parents continued to live in the home and paid the mortgage, utilities, homeowners' insurance, real estate taxes, and other expenses.¹⁶ After the final hearing on the dissolution, the trial court requested that the parties submit a brief on the issue of whether the home should be included in the marital estate and, if so, how it should be divided.¹⁷ The trial court issued its decree, awarding the home to the husband subject to a constructive trust in favor of his parents.¹⁸

8. *Id.* at 157.

9. *Id.* at 158.

10. *See id.* at 158-60 (Dickson, J., dissenting).

11. *Id.* at 159.

12. *Id.* at 159-60.

13. 919 N.E.2d 118 (Ind. Ct. App. 2009).

14. *Id.* at 121.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 121-22.

On appeal, the wife contested the placement of the home in a constructive trust and “maintain[ed] that the trial court abused its discretion by refusing to include the real estate in the marital estate and divide it between the parties.”¹⁹ Thus, the court first considered whether the constructive trust was proper. The court found that a confidential relationship existed between Parents and the husband and wife and that Parents relied on the husband’s and wife’s oral promise that they could live in the home as long as they needed.²⁰ The court held that to allow the husband and wife to dispossess Parents of their home would “permit them to be unjustly enriched by the sale price or rents and profits accruing during the remainder of . . . [Parents’ lives].”²¹ The constructive trust was therefore deemed proper.²²

Next, the court considered if it was an error to omit the home from the marital estate. The court concluded that with the imposition of the constructive trust, the husband and wife were essentially owners of a remainder interest in the property, subject to Parents’ constructive trust life estate.²³ The court ruled that the parties’ remainder interest should have been included in the marital estate and assigned a value, with this value incorporated into the division of marital assets.²⁴

The judgment of the trial court concerning the imposition of a constructive trust was affirmed, but the decision to omit the home from the marital estate was reversed. The case was remanded with instructions to assign a value to the home, include it in the marital estate and “re-divide the marital estate consistent with Indiana Code section 31-15-7-5.”²⁵

2. *Property Valuation Issues: Valuation of Minority Ownership Interests.*— In *Alexander v. Alexander*,²⁶ the Indiana Court of Appeals considered the valuation of minority ownership interests.

The husband and wife married in 1976.²⁷ During the marriage, the wife’s parents gave the wife a five percent limited partner interest in an entity that was owned exclusively by various members of the wife’s family (“Bush Farms”).²⁸ Bush Farms’s assets included approximately 1339 acres of land. During the dissolution proceedings, one of the contested issues was the value of the wife’s interest in Bush Farms.²⁹

After the final hearing, the trial court made specific findings on Bush Farms, including the following:

1. the entity’s partnership agreements provided that a limited partner could

19. *Id.* at 122.

20. *Id.* at 123.

21. *Id.* at 124.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 125.

26. 927 N.E.2d 926 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 824 (Ind. 2010).

27. *Id.* at 929.

28. *Id.* at 930.

29. *See id.* at 936.

not bring an action forcing partition of the Bush Farms's land;

2. the two general partners (the wife's father and mother) maintained exclusive control over Bush Farms, leaving the wife no decisionmaking authority;

3. for entity matters requiring limited partner approval, a ninety percent supermajority of the limited partners was required;

4. any contemplated sale of ownership by a limited partner triggered a right of first refusal for the other partners;

5. if a limited partner's interest was assigned, the assignee would have no right to inspect entity books, vote, or gather information about the entity; and

6. the partnership agreement could not be modified without approval by the two general partners and a ninety percent supermajority of the limited partners.³⁰

At trial, the wife's expert applied a twenty-five percent minority discount and a fifteen percent marketability discount to the wife's interest in Bush Farms.³¹ In reaching its conclusion on value, the trial court substantially adopted the methodology of the wife's expert, including the applicable discounts. The husband appealed, arguing that minority discounts and marketability discounts should not have been applied.³² In his argument, he relied upon the *Wenzel*³³ and *Hansen*³⁴ cases, which stand for the proposition that such discounts are inappropriate when a majority shareholder—or the corporation—is the buyer.

In considering whether discounts were appropriate, the Indiana Court of Appeals acknowledged the likelihood that at some point, the wife would either inherit her aging parents' control interest in the entity or would sell her interest to the controlling shareholders of Bush Farms.³⁵ Either of these scenarios would seem to support the husband's argument that discounts on the wife's interest in Bush Farms were inappropriate. Nevertheless, the court rejected the husband's argument, noting that no immediate sale by the wife was presently contemplated and that the mere possibility—not certainty—that the wife's interest in the entity might unite with the controlling interest in the future was insufficient to deny the trial court its discretion to apply discounts to the present value of the wife's interest.³⁶

3. *Distribution Issues.*—Cases regarding distribution issues can arise when a party to dissolution believes their spouse dissipated assets.

a. *Not filing a joint tax return constituting dissipation.*—In *Hardebeck v. Hardebeck*,³⁷ the Indiana Court of Appeals considered whether the wife's pre-separation decision not to file a joint tax return with her husband constituted "dissipation" in terms of the added resulting tax liability to the husband.

30. *Id.* at 930-31.

31. *Id.* at 931.

32. *Id.* at 936.

33. *Wenzel v. Hopper & Galliher, P.C.*, 779 N.E.2d 30 (Ind. Ct. App. 2002).

34. *Hansen v. 75 Ranch Co.*, 957 P.2d 32, 41 (Mont. 1998).

35. *Alexander*, 927 N.E.2d at 938.

36. *Id.* at 939.

37. 917 N.E.2d 694 (Ind. Ct. App. 2009).

The husband and wife married in 1965.³⁸ During the marriage, the parties had no children together, and the husband was the primary income earner.³⁹ It was the parties' practice during most of the marriage for the husband to turn over his paycheck to the wife, who then paid bills and otherwise managed the marital finances.⁴⁰ However, when the parties' relationship became strained, the husband began to alter this paycheck practice; he would cash his check, retain some money for himself, and then give the balance to his wife to pay bills.⁴¹ The trial court found that because the wife "resented this change," she refused to file taxes jointly with the husband in 2006 and 2007.⁴² The trial court found that filing separately cost the husband an additional \$8600 in taxes.⁴³ The husband filed for divorce in 2008.⁴⁴

After a final hearing, the trial court issued its decree, which adopted substantially all of the husband's proposed findings but made some edits and additions to the husband's submitted findings.⁴⁵ The trial court concluded that the wife's refusal to file a joint tax return during the marriage constituted dissipation because it was done out of spite.⁴⁶

On appeal, the wife assigned error to the nearly complete adoption of the husband's proposed findings as well as the dissipation finding.⁴⁷ On the dissipation issue, the court of appeals noted that dissipation related to an added tax liability for not filing a joint return was "a matter of first impression in Indiana."⁴⁸ However, reviewing Indiana's dissipation laws as well as some cases from foreign jurisdictions, the court concluded that the finding of dissipation was not an abuse of discretion.⁴⁹ The court held that failing to file jointly was not dissipation per se, but instead depended upon the facts of the case.⁵⁰ Here, the evidence supported the trial court's conclusion that the wife had no legitimate reason not to file jointly with the husband (e.g., specific concerns about the husband not declaring income), and that she was motivated instead by spite.

With regard to adopting the husband's proposed findings, the court noted that here, too, the practice is discouraged but not error per se.⁵¹ The court expressed its feeling of reassurance in the fact that the trial court had made changes to the husband's proposed findings. In the court's view, these "changes to address what

38. *Id.* at 696.

39. *Id.*

40. *Id.* at 697.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 696.

45. *Id.* at 699.

46. *Id.* at 702.

47. *Id.* at 698-99.

48. *Id.* at 700.

49. *Id.* at 700-02.

50. *Id.* at 701.

51. *Id.* at 698-99.

... [the trial court] deemed to be deficiencies or inaccuracies”⁵² suggested that the trial court had reviewed the husband’s proposed findings with care.

B. Child Custody and Parenting Time

Custody and parenting time disputes are a very prominent area of Indiana family law. The following is a brief review of several notable cases from the survey period.

1. *Court Order Encouraging Taking Children to Church During Parenting Time.*—In *Finnerty v. Clutter*,⁵³ the Indiana Court of Appeals considered whether a trial court abused its discretion by issuing a parenting time order that encouraged—but did not require—the father to take the children to church during his parenting time periods.⁵⁴

The facts in *Finnerty* revolved around a mother and father who divorced with two young children in 2004.⁵⁵ Their divorce decree provided for joint legal custody of the children; the mother was deemed the “primary residential custodian.”⁵⁶ At issue during the proceedings were the religious implications of the decree. Specifically, the parents began attending a Catholic church with their children while they were still married. After the divorce, the mother continued to attend and otherwise participate in church activities and events.⁵⁷ At some point, a dispute arose over whether the father’s weekend parenting time should end at 7:00 p.m. on Sunday so that he could take the children to “attend Sunday dinners with extended family,” or at 3:00 p.m., so that the mother “could take the children to Sunday evening mass.”⁵⁸ The dispute was submitted to the trial court for resolution.

After a hearing, the trial court ordered that the father’s weekends would be “from Friday 4:00 p.m. to Sunday at 7:00 p.m.”⁵⁹ The trial court’s order also stated, “Church attendance on the [f]ather’s weekend shall be his prerogative. The [c]ourt will recommend, but will not require, the children [to] attend church during the [f]ather’s parenting time, if it has been their practice in the past to do so.”⁶⁰ The mother appealed, arguing that the decree made her the “custodian” of the children by virtue of its language that she would be “the primary residential custodian.” That custodian designation, the mother further reasoned, gave her the authority to determine the children’s religious upbringing under Indiana Code section 31-17-2-17(a).⁶¹

52. *Id.* at 699.

53. 917 N.E.2d 154 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 784 (Ind. 2010).

54. *Id.* at 155.

55. *Id.*

56. *Id.* at 156.

57. *Id.* at 155.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 155-56. This portion of the Indiana Code states that “[e]xcept . . . as otherwise

Ultimately, the court of appeals rejected the mother's argument, noting that the decree expressly awarded the parties "joint legal custody" of the children.⁶² As such, Indiana Code section 31-17-2-17(a) was inapplicable.⁶³ Because the parties share responsibility for the children's religious upbringing under a joint legal custody order, the trial court's order was not inappropriate.⁶⁴ The court of appeals concluded that the trial court properly attempted to balance the father's "desire for uninterrupted parenting time" with the mother's "desire to provide the children with religious training."⁶⁵

2. *Failure to Appear at Final Hearing Due to Fear of Spousal Abuse Leads to Post-Decree Pleadings Viewed as Petition to Modify.*—In *Oberlander v. Handy*,⁶⁶ the mother—who apparently failed to appear at her own final hearing because she had fled to South Carolina to avoid the alleged abuses of the father—was precluded from having a decree that awarded custody of the child to the father set aside.⁶⁷ The Indiana Court of Appeals reviewed whether the trial court should have construed the mother's post-decree pleadings as a petition to modify custody and revisited the custody issues accordingly.⁶⁸

The mother and father in *Oberlander* began dating in 2005, and the mother gave birth to their child in 2006.⁶⁹ The parties subsequently married, but the mother filed for divorce in 2007.⁷⁰ A lengthy history of abuse, stalking of the mother, and other criminal misconduct by the father was apparently intertwined in the parties' relationship. While the divorce was pending in early 2008, the mother and child moved to South Carolina, where the mother had family, out of fear that the father would hunt her down "[a]s he had in the past."⁷¹

The trial court set the divorce for final hearing on July 22, 2008.⁷² The father appeared, but the mother did not. The resulting decree, based solely upon the evidence of the father's testimony, awarded the father all of the marital property except for the mother's car. Furthermore, it awarded custody of the child to the father.⁷³ On August 21 of that year, the mother filed a request for relief from the decree, alleging that the father committed perjury at the final hearing.⁷⁴ The trial

agreed by the parties in writing at the time of the custody order . . . the custodian may determine the child's upbringing, including the child's education, health care, and religious training." IND. CODE § 31-17-2-17(a) (2011).

62. *Id.* at 156-57.

63. *Id.* at 156.

64. *Id.* at 156-57.

65. *Id.* at 157.

66. 913 N.E.2d 734 (Ind. Ct. App. 2009).

67. *Id.* at 739.

68. *Id.* at 738-39.

69. *Id.* at 735.

70. *Id.*

71. *Id.* at 736.

72. *Id.* at 737.

73. *Id.*

74. *Id.*

court set the matter for hearing and asked the Indiana Department of Child Services (DCS) to investigate.⁷⁵ DCS recommended that the mother have custody of the child, subject to the father's supervised parenting time.⁷⁶ After a hearing, however, the trial court (failing to find fraud) did not disturb its decree other than to change custody to joint custody, with the father continuing to have primary physical custody.⁷⁷ The mother appealed.

On appeal, the court was sympathetic to the mother's situation. Ultimately, the court concluded that it "cast no aspersions upon her stated reasons for her failure to appear [at the final hearing], but the simple fact is that she was not there and the trial court was entitled to proceed in her absence."⁷⁸ Therefore, the trial court's denial of relief was affirmed.⁷⁹ However, the court also volunteered that it believed "the trial court should have treated . . . [the mother's] motion as a motion to modify the custody arrangement set forth in its initial order."⁸⁰ Thus, the matter was remanded so that the trial court could "revisit this case and weigh *all* of the evidence to determine whether a modification" would be appropriate.⁸¹

3. *Change of Circumstance Required to Make a Change in Custody.*—In *In re Marriage of Julie C. v. Andrew C.*,⁸² the Indiana Court of Appeals considered whether "when modifying custody, the change in circumstances required by Indiana Code section 31-17-2-21 need . . . be so decisive in nature as to make a change in custody necessary for the welfare of the child."⁸³

The parties in *Julie C.* married in 1995 and had two children born in 2002 and 2004.⁸⁴ When the parties divorced in 2006, the agreed dissolution decree provided for "joint legal custody . . . with [the] [m]other having primary physical custody."⁸⁵ It also provided parenting time for the father in the amount of three days a week and every other weekend.⁸⁶ The father subsequently filed for a modification of physical custody, requesting more parenting time; the mother cross-petitioned for a modification of legal custody and child support.⁸⁷ At the court's request, a domestic relations evaluator wrote a report recommending that the "[m]other and [f]ather continue to share joint legal custody," "the children continue to reside in [the] [m]other's primary care," and "[the] [f]ather have greater parenting time."⁸⁸

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 738.

79. *Id.* at 739.

80. *Id.*

81. *Id.* (emphasis in original).

82. 924 N.E.2d 1249 (Ind. Ct. App. 2010).

83. *Id.* at 1252.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1253.

At the time of the petition, the father was living with his fiancée, who also had “joint physical custody of her two children.”⁸⁹ At the hearing, the fiancée testified that it was important that the father’s children and her children be together as much as possible to help form a bond. The trial court found that “[t]here ha[d] been a substantial change in circumstances and the facts set forth in . . . [Indiana Code section] 31-17-2-21” and that it was in the children’s best interests for the parents “to share joint legal custody and that [the] [f]ather have additional overnight parenting time.”⁹⁰ The increase amounted to fifty percent of overall parenting time.

The court of appeals found that this increase in the father’s parenting time amounted to “a *de facto* modification of custody to joint physical custody.”⁹¹ The court found that the father’s upcoming marriage, along with other factors such as the children’s desire to spend more time with the father and the efforts to accomplish a blended family, constituted a substantial change in circumstances sufficient to change the original physical custody order.⁹² The court noted that the legislature changed the requirements of changing a custody order so that it is no longer a requirement to show that an existing custody order is “unreasonable;” there simply needs to be a substantial change in the statutory factors and a finding that modification is in the children’s best interests.⁹³

II. CHILD SUPPORT RULES AND GUIDELINES

The following section starts by reviewing the recent changes to the Indiana Child Support Rules and Guidelines (the “Guidelines”). The section then continues by reviewing noteworthy cases on the topic of child support and the Guidelines.

A. Amendments to the Guidelines⁹⁴

In 1989, the use of the Indiana Child Support Guidelines became mandatory for all cases involving the establishment or modification of child support. The public policy behind the Guidelines had many facets, but one substantial objective was to provide more predictability and continuity in child support calculations, from court to court, and from case to case.⁹⁵

89. *Id.* at 1252-53.

90. *Id.* at 1254-55.

91. *Id.* at 1256 (emphasis in original).

92. *See id.* at 1257-59.

93. *Id.* at 1258 (citing *Meade v. Levett*, 671 N.E.2d 1172, 1176 n.2 (Ind. Ct. App. 1996)).

94. This is not an exhaustive description of every revision to the Guidelines, and any reader seeking that level of detail should consult the court’s order amending the Guidelines directly.

95. Michael R. Kohlhaas & James A. Reed, *A Brief Survey of the New Amendments to the Indiana Child Support Rules & Guidelines*, RES GESTAE, Nov. 2009, at 30, 30, available at: <http://www.binghamchale.com/public/viewArticle.asp?id=86>.

On September 15, 2009, the Indiana Supreme Court issued an official order amending the Guidelines. These revisions to the Guidelines became effective on January 1, 2010.⁹⁶

Among the most significant changes to the Guidelines are as follows:⁹⁷

1. *Changes to Gross Weekly Income and Added Caution for Imputing Income.*—

The new Guidelines^[98] include revisions for addressing Social Security income as well as handling imputation of income. Guideline 3(A)(1) is revised to provide that Social Security disability benefits paid for the benefit of a child are included in the disabled parent's [w]eekly [g]ross [i]ncome; however, that parent is also entitled to a credit for the amount of that benefit.

Guideline 3(A)(3) is revised to provide that potential income should be imputed to a parent only when the unemployment or underemployment is "without just cause." The [c]ommentary to this section is also revised to provide that where the underemployment or unemployment is the result of a disability, health issue, excessive child care costs or similar circumstances, it may be improper to impute *any* income to the parent. This revision seemingly modifies the widely used past of imputing an amount no less than minimum wage to an unemployed or underemployed parent. The [c]ommentary also is revised to dovetail with recent case law discouraging imputing potential income to incarcerated parents.^[99]

The old Guidelines used a multiplier that reduced a parent's [w]eekly [g]ross [i]ncome depending upon the number of subsequent children. Though the net effect on the child support obligation remains the same, under the new Guidelines, the parent's [w]eekly [g]ross [i]ncome is not reduced; instead, a new line 1(A) is added to the [c]hild [s]upport [o]bligation [w]orksheet that produces a credit against [w]eekly [g]ross [i]ncome. Additionally, the new credit line allows for up to eight subsequent children, whereas the old Guidelines provided multipliers for only five or fewer subsequent children. The impact on the final support amount as a result of subsequent children remains unchanged.¹⁰⁰

96. *Id.*

97. The following subsections, discussing the most significant changes to the Guidelines, are abstracts from an article by Michael Kohlhaas and James Reed, who are likewise authors hereto. For a more detailed discussion of the 2010 amendments to the Guidelines, please see *id.*

98. For ease of discussion, this article refers to the Guidelines prior to the recent amendment as "the old Guidelines" and the amended version as "the new Guidelines."

99. See, e.g., *Lambert v. Lambert*, 861 N.E.2d 1176 (Ind. 2007); see also *Becker v. Becker*, 902 N.E.2d 818 (Ind. 2009).

100. Kohlhaas & Reed, *supra* note 95, at 30.

2. *Elimination of the Child Support Plateau for High Income Earners.*—

One of the more significant changes to the Guidelines can be found in Guideline 3(D). The new Guidelines retain a substantially similar means of calculating the parties' [c]ombined [w]eekly [a]djusted [i]ncome. Likewise, the [c]ombined [w]eekly [a]djusted [i]ncome is still plugged into the Guidelines' "Schedules Table" to determine the parties' [b]asic [c]hild [s]upport [o]bligation, which is simply a function of: (1) the parents' [c]ombined [w]eekly [a]djusted [i]ncome; and (2) the number of children. However, under the old Guidelines, the [s]chedules maxed out at \$4,000 per week (or \$208,000 per year) of [c]ombined [w]eekly [a]djusted [i]ncome. For income levels in excess of \$4,000 per week, the Guidelines applied a complicated formula that had the effect of causing support amounts to plateau as income increased further.

Under the new Guidelines, the [s]chedules max out at \$10,000 per week (or \$520,000 per year) of [c]ombined [w]eekly [a]djusted [i]ncome. Further, for income levels in excess of \$10,000 per week, the plateau-causing formula has been jettisoned in favor of a simple linear calculation. For all income above \$10,000 per week, the [b]asic [c]hild [s]upport [o]bligation will increase at a fixed percentage of the income above \$10,000 per week, depending upon the number of children (e.g., 7.1 percent for one child, 10 percent for two children, 11.5 percent for three children, 12.9 percent for four children, etc.).

....

The new Guidelines also provide that, beyond \$10,000 per week, the support obligation increases in a linear fashion at 7.1 percent of combined weekly income for one child. So, there never is any "plateau" in support obligation. Everything else held constant, child support for someone earning \$20,000 per week will be roughly twice what it would be earning \$10,000 per week. This is a substantial departure from the operation of the old Guidelines.¹⁰¹

3. *New Rebuttable Presumption That "Negative" Support Orders Require Support Payments from Custodial Parent to Non-Custodial Parent.*—

The new Guidelines contain added language in Guideline 3(F) providing that[] when a child support calculation produces a "negative" support amount for the non[]custodial parent, there is now a rebuttable presumption under the new Guidelines that the custodial parent shall pay to the noncustodial parent an amount equal to the "negative" support figure. This effectively overrules the interpretation of the old Guidelines set forth in *Grant v. Hager*. . . .¹⁰²

4. *Other Notable Changes.*—In addition to the revisions of the Guidelines

101. *Id.* at 30-31 (emphasis in original).

102. *Id.* at 31 (citation omitted).

listed above, there are many other notable changes. Such changes include: (1) guidance regarding Social Security benefits; (2) “new exceptions to [the] rule that child support modifications may relate back no earlier than date petition to modify is filed;”¹⁰³ (3) details on allocating “controlled expenses;” (4) a new health care guideline and worksheet; (5) the movement of “extraordinary expenses” and “accountability and tax exemptions” from commentary to guideline; and (6) a “[n]ew provision on rounding to [the] nearest dollar.”¹⁰⁴ The new Guidelines also include revisions related to the topics of elementary and secondary education, other extraordinary expenses, accounting, and tax exemptions.¹⁰⁵

*B. Retroactive Child Support Preceding the Date of Filing
a Petition for Dissolution Is Improper*

In *Boone v. Boone*,¹⁰⁶ the Indiana Court of Appeals considered whether it was error for a divorce court to issue a child support order that was “retroactive to a date preceding the filing of the petition for dissolution”¹⁰⁷ of marriage if the parties were living separately for that period of time. The mother and father in *Boone* married in 1998 and had one child together.¹⁰⁸ The mother and father physically separated in 2002, but neither filed for divorce at that time.¹⁰⁹ After the 2002 physical separation, the father began informally sending money to the mother every other week until June 2006.¹¹⁰ At that time, the father filed a petition for dissolution in Illinois, which was ultimately dismissed due to the mother’s Indiana residency.¹¹¹ In November 2007, the father filed a petition for dissolution in Lake County, Indiana.¹¹²

At the final hearing in late 2008, the mother asked the trial court to award child support retroactive to June 2006—the date the father stopped making the informal support payments to the mother—even though this predated the filing of the petition for dissolution by about fifteen months.¹¹³ After the final hearing, the trial court granted the mother’s request by issuing a retroactive support order to June 2006, thereby generating an immediate support arrearage of about \$14,000 to which the father appealed.¹¹⁴

In its analysis, the court of appeals noted that it was a matter of first

103. *Id.* at 32.

104. *See id.* at 31-37.

105. *See id.* at 37.

106. 924 N.E.2d 649 (Ind. Ct. App. 2010).

107. *Id.* at 650.

108. *Id.*

109. *See id.*

110. *See id.* at 650-51.

111. *Id.*

112. *Id.* at 651.

113. *Id.*

114. *Id.*

impression in Indiana as to whether a trial court in a divorce action has the authority to issue a retroactive support order for a period before the date the petition for dissolution was filed.¹¹⁵ The court recognized the common law duty to support children; however, the court observed that neither statutes nor the Guidelines authorize a retroactive order of this nature.¹¹⁶ In addition, the court noted well-settled case law that such a modification may not be made retroactive prior to the date a petition to modify is filed, absent limited and unusual exceptions.¹¹⁷ Therefore, *Boone* held that the trial court abused its discretion in issuing its support order, and the decision was reversed and remanded to be reformed consistent with the opinion.¹¹⁸

C. Proper Deductions from Weekly Gross Income

In *Ashworth v. Ehrgott*,¹¹⁹ the Indiana Court of Appeals reviewed a comprehensive child support order, considering whether the trial court erred with respect to its deduction of alimony payments from the father's weekly gross income, its failure to deduct health insurance payments for children, and its improper inclusion of school expenses in the order.¹²⁰

In *Ashworth*, the father and mother had two children and were divorced in Tennessee in 2006.¹²¹ The trial court ordered the father to pay the mother \$306,000 of alimony in monthly installments of \$1500.¹²² The father was also ordered to pay \$40,000 for the mother's attorney's fees in yearly installments of \$8000.¹²³ The mother had sole legal and physical custody of the children and was to receive \$2500 per month in child support from the father.¹²⁴ This figure was to be recalculated in accordance with Tennessee's child support guidelines in 2008.¹²⁵ The father was also to provide health insurance coverage for the children.¹²⁶

The mother moved to Indiana in 2008.¹²⁷ In 2008, the father unilaterally reduced his monthly child support payments to \$1160, the amount provided in the father's revised Tennessee child support worksheet.¹²⁸ The father then moved

115. *Id.* at 652.

116. *Id.* at 653. By contrast, the court noted the paternity statute, which expressly authorizes the relation back of a support order to the child's date of birth. *Id.*

117. *Id.* at 654.

118. *Id.* at 655.

119. 934 N.E.2d 152 (Ind. Ct. App. 2010).

120. *Id.* at 155.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 156.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

to California, and the mother filed a petition to register the Tennessee child support order in Indiana.¹²⁹ The Indiana court entered a child support income withholding order directing the father's employer to withhold a weekly amount adding up to \$2500 per month.¹³⁰ In April 2009, the father petitioned the court for a stay of the income withholding order.¹³¹ The court denied the petition but held a hearing in June 2009 on the child support order.¹³²

Following the June 2009 hearing, the trial court entered a detailed order modifying the father's child support obligation. The court found that the father's child support should be \$500.75 per week, with an added child support obligation of \$231 per week for educational expenses for the minor children.¹³³ The father then filed a motion to vacate the order, arguing that some of the educational expenses were counted twice.¹³⁴ The court subsequently entered a revised order of \$612.10 per week.¹³⁵ In response, the father filed a motion to correct errors; because the court never ruled on this motion, it was deemed denied.

On appeal, the father raised numerous issues. He first contended that the trial court improperly included the amount he paid as alimony in his weekly gross income for purposes of calculating child support. Using Indiana law, the court determined that the monthly \$2500 payments were maintenance payments and not part of a property division.¹³⁶ The court then determined that the \$40,000 attorney's fee payments were part of a property division.¹³⁷ This issue was remanded for a recalculation of the father's weekly gross income.¹³⁸ The father then challenged the trial court's failure to award him credit for the children's health insurance premiums. The court reversed and remanded with instructions to provide the father with this credit.¹³⁹

The father also contended that the trial court erred in failing to reduce his child support obligation based upon his higher tax bracket. The trial court's calculation found that the father's actual tax rate differed from Indiana's presumed rate by 10.72% and then deducted this from his weekly gross income.¹⁴⁰ The court of appeals found these calculations correct and affirmed the trial court's order in this regard.¹⁴¹

Next, the father argued that the trial court erred by failing to give him credit for travel expenses associated with exercising parenting time. Citing the

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 157.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 158-59.

137. *Id.* at 161-62.

138. *Id.* at 161.

139. *Id.* at 162.

140. *Id.* at 163.

141. *Id.*

commentary to the Guidelines, the court of appeals stated that the trial court had discretion to deviate from Guideline amounts to take these expenses into consideration.¹⁴² The trial court had previously determined that the father's financial resources did not justify reducing the child support obligation, and the court of appeals held that the trial court did not abuse its discretion in failing to credit the father for his travel expenses.¹⁴³

The father then challenged the trial court's award of his daughter's preschool expenses. Even though the mother was not working, she had included these expenses as a work-related child care expense. As there was no evidence that the mother had worked or searched for a job (thus requiring full-time care for her child), the appellate court found that including these expenses . . . an abuse of discretion.¹⁴⁴ Similarly, the father challenged the order requiring him to pay private school tuition for his son. Finding that the parties did not agree on private school for their children, and considering Guideline 8, the court held that the trial court's order requiring the father to pay private school tuition was also an abuse of discretion.¹⁴⁵

In sum, the *Ashworth* court reviewed the trial court's comprehensive child support order and determined that the trial court erred with respect to its deduction of alimony payments from the father's weekly gross income, its failure to deduct health insurance payments for children, and its improper inclusion of school expenses.¹⁴⁶ The court affirmed the order in all other respects.

D. Parenting Time Credit and Inclusion of Irregular Bonus Income

In *In re Paternity of S.G.H.*,¹⁴⁷ the Indiana Court of Appeals considered whether the trial court erred in calculating child support by awarding both a parenting time credit and the abatement of support during father's parenting time. The court also considered whether the trial court erred by including father's irregular bonus income in the child support calculation.¹⁴⁸

In *S.G.H.*, the mother and father had a child together. Paternity and child support were established in 1997.¹⁴⁹ In 2007, the mother filed a petition to modify child support.¹⁵⁰ The trial court set a base child support obligation for the father of \$131 per week, along with provisions concerning the father's bonus income that apparently resulted in some confusion in its interpretation.¹⁵¹ Part of the root of the confusion was that the father typically received two different

142. *Id.* at 163-64.

143. *Id.* at 164.

144. *Id.*

145. *Id.* at 165-66.

146. *Id.* at 155.

147. 913 N.E.2d 1265 (Ind. Ct. App. 2009).

148. *Id.* at 1266.

149. *Id.*

150. *Id.*

151. *See id.*

types of bonuses: (1) semiannual bonuses of \$20,000, which the father received each January and July; and (2) “windfall bonuses,” which the father received every two years or so, and which were unpredictable in amount.¹⁵²

The trial court held a hearing to clarify its order and address a petition filed by the father to modify summer parenting time. Following that hearing, the trial court issued an order stating that the father’s annual bonuses were already calculated into the court’s base child support calculation, and that the father was obligated to report his windfall bonuses upon receipt.¹⁵³ Further, if the father’s windfall bonus would result in a twenty percent change in the father’s child support obligation, he would be obligated to pay the resulting difference in the support amount.¹⁵⁴ In addition, the trial court granted the father’s request to modify the summer parenting time schedule and ordered that the father’s support obligation abate during his summer parenting time, citing Indiana’s parenting time guidelines.¹⁵⁵ The mother appealed both the handling of the windfall bonuses and the summer parenting time abatement.

The court of appeals agreed with the mother in both respects. As to the abatement, the court believed this was a relic of the old Guidelines prior to the establishment of the parenting time credit.¹⁵⁶ Moreover, it was improper for the trial court to award the father both a parenting time credit in his base support obligation and then to abate support during summer parenting time.¹⁵⁷

As to the windfall bonuses, the court referenced the commentary in the Child Support Guidelines for handling the irregular bonus income.¹⁵⁸ With that guidance, it was inappropriate to include the father’s windfall bonuses in the child support calculation only if they caused the support amount to change by at least twenty percent.¹⁵⁹ In effect, the appellate court concluded that the trial court erroneously applied a modification standard to the windfall bonuses.

E. Child Support Arrearage Accrued for Now-Adult Child

In *Hicks v. Smith*,¹⁶⁰ the Indiana Court of Appeals considered whether the trial court abused its discretion in awarding a judgment for child support arrearage to the mother rather than to the now-adult child for whom the child support arrearage had accrued. The parties in *Hicks* were parents to a son born in 1985.¹⁶¹ Their marriage was dissolved by decree in 1989.¹⁶² On March 20,

152. *Id.*

153. *Id.*

154. *Id.* at 1267.

155. *Id.*

156. *Id.* at 1267-68.

157. *See id.*

158. *Id.* at 1268-69.

159. *Id.*

160. 919 N.E.2d 1169 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 791 (Ind. 2010).

161. *Id.* at 1170.

162. *Id.*

1992, the court entered an order granting sole custody of the son to the mother, giving the father “reasonable and liberal visitation,” and requiring the father to pay \$47 weekly in child support.¹⁶³ On March 22, 1992, the father absconded with the son.¹⁶⁴

During the period when the father and son were out of the Indiana jurisdiction, the father did not pay child support as required by the order. On April 30, 1993, the court entered an order finding the father in contempt and entered a judgment of \$3029, representing arrearage and attorney fees.¹⁶⁵ On December 8, 1994, the court amended the order to reflect an extra \$4418 in arrears, which led to a final judgment of \$7447.¹⁶⁶ The father was also charged with a crime for absconding with the son; he was a fugitive until August 2008, when he appeared in court to answer the criminal charges. At this point, the mother brought a motion to collect the December 8, 1994 judgment plus interest and petitioned for support arrearage that had since accrued.¹⁶⁷

In response to the mother’s petitions, the trial court ordered the father to pay interest on the judgment and to be responsible for an additional arrearage from the date of judgment through May 2, 2006—the son’s twenty-first birthday—of \$27,965 plus interest.¹⁶⁸ The court denied the father’s motion for relief from judgment as well as his “request to have any and all money paid toward satisfaction of any said judgments held in trust for the child.”¹⁶⁹ The father appealed.

In its discussion of the nature of arrearage and the purposes of child support, the court of appeals stated that “once funds have accrued to the child’s benefit, the trial court lacks the power to reduce, annul, or vacate the child support order retroactively.”¹⁷⁰ The court noted the two exceptions to this rule: (1) where parties have agreed to and executed other payment methods that substantially comply with the decree;¹⁷¹ and (2) “where the obligated parent, by agreement with the custodial parent, ‘takes the child into his or her home, assumes custody, provides necessities, and exercises parental control for such a period of time’ that a permanent change of custody is effected.”¹⁷² The court found that neither exception applied to the situation at hand.¹⁷³

Next, the court turned to the unique facts of this case, as it was undisputed

163. *Id.*

164. *Id.* at 1170-71.

165. *Id.* at 1171.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1171-72 (citing IND. CODE § 31-16-16-6(a) (2011); *Whited v. Whited*, 859 N.E.2d 657, 661 (Ind. 2007)).

171. *Id.* at 1172 (citing *Whited*, 859 N.E.2d at 662; *Payson v. Payson*, 442 N.E.2d 1123, 1129 (Ind. Ct. App. 1982)).

172. *Id.* (citing *Whited*, 859 N.E.2d at 662)).

173. *See id.* at 1173-75.

that the father never paid any child support and the mother never had physical custody of the son due to the father absconding with him. The court stated that there were three people who could have claimed the arrearage.¹⁷⁴ The father would not succeed; despite having supported the son, he was “clearly not entitled to have the arrearage forgiven because of his wrongdoing in taking custody of . . . [the son] in willful violation of a court order.”¹⁷⁵ The mother was the next option. Although she did not provide financial support, the court noted that “being unaware of his whereabouts, [she] also did not have the option to support him.”¹⁷⁶ The third option—the son—was presumably fully supported by the father and therefore did not have to support himself. Weighing these three options, the court concluded that there was no authority for awarding the arrearage to the son and that the trial court did not abuse its discretion in awarding the amount to the mother.¹⁷⁷

III. ISSUES PERTAINING TO RELOCATION AND OUT-OF-STATE PARENTS

Issues pertaining to relocation and out-of-state parents—including relocation requests, attempts at gaining a jurisdictional advantage, maintaining a substantial connection so as to retain jurisdiction in Indiana, and enforcing a foreign child support order—arise from time to time in Indiana family law. The following section reviews several such noteworthy cases from the survey period.

A. Relocation Requests

In *In re Paternity of X.A.S.*,¹⁷⁸ the Indiana Court of Appeals considered whether the trial court abused its discretion when it denied the father’s requested relocation with the child to California.¹⁷⁹

The child at issue in *X.A.S.* was born in 1997.¹⁸⁰ The father established paternity and was granted custody of the child. Pursuant to Indiana’s parenting time guidelines, his custody was subject to visitation with the mother. The father and mother were both extensively involved in the child’s life and remained cordial to each other during the period the child lived with the father. The father married another woman—a member of the U.S. Navy—in 2008.¹⁸¹ He filed a notice of intent to relocate, requesting permission for the child to relocate to California (where the stepmother’s ship was based) with the father and stepmother.¹⁸² The mother objected and petitioned to modify custody, but the state domestic relations counseling bureau’s report supported the father’s

174. *Id.* at 1174.

175. *Id.*

176. *Id.*

177. *Id.* at 1174-75.

178. 928 N.E.2d 222 (Ind. Ct. App.), *trans. denied*, 2010 Ind. LEXIS 603 (Ind. 2010).

179. *Id.* at 223.

180. *Id.*

181. *Id.*

182. *Id.*

request.¹⁸³ Thereafter, the trial court conducted a hearing and refused the father's request to conduct an in camera interview with the child.¹⁸⁴ The trial court entered a summary order that the child was to stay in Indiana.

On appeal, the court considered the state relocation statute¹⁸⁵ and the six factors relevant to the best interests of the child.¹⁸⁶ The relevant factors examined by the court included the "hardship and expense involved for [the] [m]other to exercise parenting time."¹⁸⁷ It was the trial court's opinion that such hardship and expense would be "extreme" for the mother.¹⁸⁸ The court of appeals, however, found that the evidence did not support this finding because the father offered to pay for the child to fly back to Indiana for summer, Christmas, and spring breaks so that the mother could exercise her parenting time.¹⁸⁹ The trial court had also found that the feasibility of preserving the mother-child relationship—including financial considerations—would be "nearly impossible."¹⁹⁰ The court of appeals, as discussed above, held that this finding was not supported by the evidence due to the father's offer to pay for the flights.¹⁹¹ The appellate court noted that situations in which the parents are separated by distance are always difficult, and it is the court's responsibility to aid the parties.¹⁹²

The court of appeals also took issue with the trial court's finding that the father's "insistence on moving with or without his son effectively rob[bed] [the

183. *Id.*

184. *Id.* at 224.

185. *Id.* at 224-25; *see* IND. CODE § 31-17-2.2-1 (2011).

186. *X.A.S.*, 928 N.E.2d at 225. The court cited the following factors:

- (1) The distance involved in the proposed change of residence.
- (2) The hardship and expense involved for the nonrelocating individual to exercise parenting time
- (3) The feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time . . . , including consideration of the financial circumstances of the parties.
- (4) Whether there is an established pattern of conduct by the relocating individual, including actions by the relocating individual to either promote or thwart a nonrelocating individual's contact with the child.
- (5) The reasons provided by the:
 - (A) relocating individual for seeking relocation; and
 - (B) nonrelocating parent for opposing the relocation of the child.
- (6) Other factors affecting the best interest of the child.

Id. (quoting IND. CODE § 31-17-2.2-1(b)) (citation omitted).

187. *Id.* at 226.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

child] of one of his parents.”¹⁹³ The court said that “this finding cast[] aspersion on [the] [f]ather, his motives, and his actions in a way that . . . [was] wholly unsupported by the record.”¹⁹⁴ The court also rebuked the trial court’s finding that by getting married, the father was choosing “romantic interests” over his child’s interests.¹⁹⁵ Again, the court noted that this was not supported by the record and opined that the “[f]ather was not required to choose between marriage and parenting—he can have both.”¹⁹⁶ The court noted several other inferences related to the “best interest” factors that the trial court relied upon—again, factors that were unsupported by the record.¹⁹⁷

Though the court of appeals noted that the trial court was not required to conduct an in camera interview, it stated that it would have been better practice for the trial court to do so, given that the child was twelve years old and had expressed his desire to live with his father to the domestic relations counseling bureau.¹⁹⁸ The court also noted that the trial court’s explanation as to why an in camera interview was not conducted was that the trial court “knew precisely what . . . [the child] would say and that, in any event, the trial court was not ‘particularly interested.’”¹⁹⁹ Finally, the court noted that both parents were loving parents who only wanted the best for the child, and one of them was going to face “an undeniable heartbreak.”²⁰⁰ That said, the court determined that the evidence did not support granting the mother’s petition to modify custody and that denial of the father’s petition to relocate was clearly erroneous.²⁰¹

B. One Parent Cannot Gain a Jurisdictional Advantage over the Other by Unilaterally Removing a Child to Another State

*In re K.C.*²⁰² involved a father who had taken his child from Indiana to Mississippi and the mother’s action to force the return of the child to Indiana.²⁰³ The Indiana Court of Appeals considered whether the trial court erred in determining that it did not have jurisdiction to entertain the mother’s action pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA).²⁰⁴ The mother in this case had given birth to the child in 2003—out of wedlock—in Indiana.²⁰⁵ Because there had been no paternity affidavit or proceedings, she had sole legal

193. *Id.* at 226-27.

194. *Id.*

195. *Id.* at 227.

196. *Id.*

197. *Id.* at 227-29.

198. *Id.* at 229.

199. *Id.*

200. *Id.*

201. *Id.*

202. 922 N.E.2d 738 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 796 (Ind. 2010).

203. *Id.* at 739.

204. *Id.*

205. *Id.*

custody of the child.²⁰⁶ Without any further determination or modification of custody, the father “removed [the child] from Indiana to Alabama and later to Mississippi.”²⁰⁷ There was conflicting information in the trial record as to whether the father had abducted the child or the mother had abandoned the child.²⁰⁸

When the mother found the father in Mississippi, she filed a writ of habeas corpus in Indiana, seeking an order that the father return the child to her.²⁰⁹ The father “moved to dismiss, claiming that Mississippi had become [the child’s] home state and the proper state to adjudicate custody” under the UCCJA.²¹⁰ The Indiana trial court agreed and dismissed the matter. Because the UCCJA governs “custody matters,” and because this was an action by a mother who already had sole legal custody to force the return of her child (rather than an action to establish or modify custody), the UCCJA did not apply.²¹¹ The mother appealed the dismissal.

The court of appeals reversed and remanded the trial court’s decision.²¹² The court noted that “[t]he UCCJA defines ‘home state’ as ‘the state in which a child lived with (1) a parent; or (2) a person acting as a parent; for at least six (6) consecutive months immediately before the commencement of a child custody proceeding.’”²¹³ The court placed great weight on the fact that the mother had not filed a “custody proceeding,” but a motion to enforce her preexisting legal custody rights.²¹⁴ As such, the mother’s writ of habeas corpus “did not implicate the provisions of the UCCJA.”²¹⁵

The court then noted in dicta that even had the UCCJA been implicated, there is substantial case law holding that “one parent cannot ‘gain home state jurisdictional advantage’” over the other “by taking a child to another state.”²¹⁶

C. Jurisdiction Pursuant to the UCCJA’s “Significant Connection” Test

In *Tamasy v. Kovacs*,²¹⁷ the Indiana Court of Appeals considered whether the trial court abused its discretion in a custody modification matter when it denied the mother’s motion to transfer the proceedings out of state and modified custody from the mother to father.²¹⁸ The mother and father had divorced in Indiana in

206. *Id.*

207. *Id.*

208. *See id.*

209. *Id.*

210. *Id.*

211. *See id.*

212. *Id.*

213. *Id.* (citing IND. CODE § 31-21-2-8 (2011)).

214. *Id.*

215. *Id.*

216. *Id.* (citation omitted).

217. 929 N.E.2d 820 (Ind. Ct. App. 2010).

218. *Id.* at 824.

2000.²¹⁹ The parties shared legal custody of their three children, with the mother providing primary physical custody. Shortly after the dissolution decree was issued, the mother relocated with the children to Massachusetts.

In 2008, the father filed a petition to modify custody in an Indiana court.²²⁰ Days later, the mother filed for custody in a Massachusetts court and then filed a motion in the Indiana trial court asking that it decline jurisdiction due to the proceedings in Massachusetts—which, as her new state of residence, was “a more convenient forum.”²²¹ The Indiana trial court denied her motion.²²² Following extended hearings, which included a custody evaluation recommending that the children return to Indiana, the trial court modified custody in favor of the father.²²³ The mother appealed.

The court of appeals first noted that due to the interstate nature of the case, the UCCJA controlled.²²⁴ It was “undisputed that the trial court had jurisdiction” to issue its custody order set forth in the original decree “because Indiana was the home state of the children” in 2000.²²⁵ Thereafter, although the mother and children moved away, the father remained in Indiana. Under the UCCJA, the trial court retains exclusive jurisdiction as long as the matter and the state maintain a “significant connection,” and it is up to the trial court’s discretion to determine whether that “significant connection” still exists.²²⁶ The court concluded that the father’s continued presence in Indiana after the decree constituted adequate grounds for the “significant connection” to support the trial court’s retention of jurisdiction.²²⁷ The court also concluded that the trial court did not abuse its discretion in its modification of custody for several reasons. Specifically, evidence was presented that the children expressed a preference to be with their father, the children were more emotionally open with the father, and the father had a better capacity for raising the children.²²⁸ As such, it was in their best interest to relocate to Indiana.

D. Enforcing a Foreign Child Support Order

In *Hamilton v. Hamilton*,²²⁹ the Indiana Supreme Court considered whether the means by which an Indiana court enforces a foreign child support obligation are subject to “full faith and credit.”²³⁰ Additionally, it considered whether an

219. *Id.*

220. *Id.* at 825.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 826.

226. *Id.* at 826-27.

227. *Id.* at 827.

228. *Id.* at 832, 836-37.

229. 914 N.E.2d 747 (Ind. 2009).

230. *Id.* at 750.

Indiana court attempting to enforce a foreign child support obligation may fashion a different method of collection than the one originally set forth by the foreign court.²³¹

After the mother and father divorced in Florida in 2005, the mother was awarded custody of the parties' two children, and the father was ordered to pay child support of \$1473 per month.²³² The mother subsequently filed a motion for contempt against the father in Florida when he did not meet his support obligations. The father was found in contempt, and the court concluded that he owed the mother \$11,879.²³³ Further, the father was ordered to pay \$7500 of that arrearage within twenty days to avoid 170 days in jail.²³⁴

After the Florida proceedings, the father moved to Indiana to live with his parents. The mother then sought to enforce that state's orders by registering the judgment and contempt order in an Indiana trial court.²³⁵ The trial court concluded that Florida's orders were "entitled to full faith and credit," but its contempt remedies were "discretionary and . . . [did] not bind responding tribunals."²³⁶ The trial court also found the father in contempt but provided for a less strict purging opportunity than the Florida court had imposed.²³⁷ Although the Indiana trial court also ordered 170 days of jail time for the father, it stayed the sentence contingent upon his "paying . . . [the mother] \$1000, obtaining full-time employment, and executing a wage assignment."²³⁸ At a subsequent review hearing, the Indiana court found that the father was not in contempt because he had complied with the three conditions; further, he was paying the mother in excess of the sixty percent of net income limitation imposed by the Federal Consumer Credit Protection Act (FCCPA).²³⁹ The mother appealed, arguing that the Indiana trial court's orders were "an impermissible modification" of the Florida orders and that the Indiana court had erred by interpreting the FCCPA as a cap on the father's support obligations.²⁴⁰ The Indiana Court of Appeals affirmed the trial court's decision, and the Indiana Supreme Court granted transfer.²⁴¹

Reviewing the history of the Uniform Interstate Family Support Act, the Full Faith and Credit for Child Support Orders Act, and related case law, the Indiana Supreme Court concluded that the Indiana trial court properly "gave full faith and credit to the Florida support order" that the father pay the mother child support

231. *Id.* at 750-54.

232. *Id.* at 749.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* (agreeing to stay the father's jail sentence if he paid \$3750 rather than \$7500).

238. *Id.*

239. *Id.* at 749-50.

240. *Id.* at 750.

241. *Id.*

of \$1473 per month and that arrearages continued to accrue on that amount.²⁴² Further, the Indiana court acted within its discretion to modify the means by which that child support obligation was enforced.²⁴³ Justice Boehm noted that “[t]he trial court is entitled to fashion its order in a manner best designed to encourage compliance.”²⁴⁴

The mother also appealed the Indiana trial court’s finding that the father was not in contempt. In reviewing that issue, the Indiana Supreme Court was troubled by the trial court’s apparent reliance on the FCCPA.²⁴⁵ The FCCPA imposes a maximum wage garnishment of sixty percent of the disposable income of an obligor who, like the father in *Hamilton*, has no other dependent spouse or child.²⁴⁶ However, the supreme court underscored that the FCCPA imposes a limitation only on wage assignments, not on what support may be ordered or garnished by non-wage sources.²⁴⁷ Therefore, the Indiana Supreme Court remanded this issue to the trial court for a reconsideration of the contempt finding made independently of FCCPA, noting that “[t]o the extent the trial court’s ruling was based on the FCCPA garnishment limitations, it was predicated on an erroneous view of the law.”²⁴⁸

IV. PATERNITY AND MATERNITY

Issues pertaining to paternity—and occasionally maternity—arise in Indiana family law. The following section reviews several such noteworthy cases from the survey period.

A. Putative Father as Next Friend for Purposes of a Paternity Petition

In *In re Adoption of E.L.*,²⁴⁹ the Indiana Court of Appeals considered whether the trial court properly dismissed two paternity petitions: one brought by the putative father, and the other listing the putative father as co-petitioner, as next friend on behalf of the child.²⁵⁰ The child at issue was born in 2004, and the mother and putative father were unmarried.²⁵¹ No father appeared on the child’s birth certificate, nor had paternity been subsequently established.²⁵² During the child’s first year, the parents worked out an arrangement where the putative father cared for the child two nights a week but neither lived with the mother nor

242. *Id.* at 753.

243. *Id.*

244. *Id.* at 754.

245. *See id.* at 755-56.

246. *Id.* at 755.

247. *Id.* at 755-56.

248. *Id.* at 756.

249. 913 N.E.2d 1276 (Ind. Ct. App. 2009), *aff’d mem.*, 938 N.E.2d 863 (2010).

250. *Id.* at 1278.

251. *Id.* at 1277.

252. *Id.*

provided financial support.²⁵³ In 2006, the putative father moved to Florida and had no more regular contact with the child. The mother married another man, J.N., in 2006, and the child thereafter resided with them.²⁵⁴

In 2007, with the mother's consent, J.N. filed a petition to adopt her child.²⁵⁵ The putative father refused consent and subsequently "filed a paternity petition on his own behalf and on behalf of . . . [the child], naming himself and [the child] as '[c]o-[p]etitioners.'" ²⁵⁶ The trial court consolidated the adoption and paternity actions.²⁵⁷ The mother moved for dismissal, arguing that the putative father "was barred by Indiana statute from petitioning for paternity."²⁵⁸ The trial court granted the motion and dismissed the paternity action with respect to both the putative father and the child (by the putative father as next friend).

Analyzing the trial court's dismissal of the action, the court of appeals noted that the trial court relied on Indiana Code section 31-19-9-12(1), "under which a putative father's consent to adoption is implied if the putative father fails to file within thirty days' notice of the adoption petition '(A) a motion to contest the adoption . . . and (B) a paternity action.'" ²⁵⁹ Here, the putative father did file the paternity action within thirty days but failed to contest the adoption, so the trial court determined that he "was barred from petitioning for paternity by Indiana Code section 31-19-9-14."²⁶⁰ The court noted that after the trial court's order, the Indiana Supreme Court determined in a different matter that consent is implied "only when a putative father 'fails in *both* respects'" to meet the requirements of Indiana Code section 31-19-9-12(1).²⁶¹ Given this development, the court of appeals analyzed other Indiana statutes to determine whether the putative father's petition should have been barred.²⁶²

The court of appeals determined that the putative father failed to register as a putative father and that such failure "constitutes an irrevocably implied consent to the child's adoption."²⁶³ The court also dismissed the putative father's argument that his timely filing for paternity as to the adoption petition mooted the failure to file in the state putative father registry.²⁶⁴ In discussing the requirements, the court noted that filing a paternity action "does not relieve the putative father from the: (1) obligation of registering; or (2) consequences of failing to register . . . unless paternity has been established before the filing of the

253. *Id.* at 1278.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* (emphasis added).

260. *Id.* at 1279 (citation omitted).

261. *Id.* (quoting *In re Adoption of Unborn Child of B.W.*, 908 N.E.2d 586, 592 (Ind. 2009)) (emphasis in original).

262. *Id.*

263. *Id.* at 1280 (quoting IND. CODE § 31-19-5-18 (2011)).

264. *Id.*

petition for adoption of the child.”²⁶⁵ Additionally, the putative father’s paternity petition would fail under Indiana Code section 31-14-5-3(b), which sets a two year limitation to file for paternity, subject to six exceptions, none of which were applicable in this instance.²⁶⁶

Next, the court discussed the paternity petition by the child (by the putative father as next friend). Following Indiana precedent, the court determined that “a putative father is a proper next friend for purposes of a paternity petition.”²⁶⁷ The court also stated that “the time limitation of Indiana Code section 31-14-5-3(b) does not apply when the child is the petitioner. Rather, under Indiana Code section 31-14-5-2(b), ‘a child may file a paternity petition at any time before the child reaches twenty (20) years of age.’”²⁶⁸ The court concluded that “the trial court erred in dismissing the paternity petition with respect to . . . [the child] because no Indiana statute sets forth applicable grounds for dismissing a paternity petition filed on behalf of a minor child by a next friend.”²⁶⁹

B. Establishment of Maternity in a Non-Birth Mother

In *In re Paternity and Maternity of Infant R.*,²⁷⁰ the court of appeals considered, in the context of surrogacy, whether Indiana law permits an establishment of maternity other than to a birth mother.²⁷¹ This case involved a father and biological mother who arranged to have their embryo implanted in a surrogate. During the pregnancy, the father executed a paternity affidavit, and all three of the parties filed a petition together to establish paternity and maternity.²⁷² The parties submitted an agreed entry to establish maternity in the biological mother. However, the trial court refused to approve that portion of the agreed entry, finding that Indiana law did not permit the establishment of maternity in a non-birth mother.²⁷³ All three parties appealed.

The court of appeals observed that reproductive technologies have changed substantially since the initial adoption of Indiana’s parentage statute.²⁷⁴ The court also noted the public policy rationale for favoring the establishment of legal family bonds.²⁷⁵ Thus, the court determined that equity required that an establishment of maternity be permitted.²⁷⁶ The court expressly noted that these

265. *Id.* (quoting IND. CODE § 31-19-5-6(b) (2011)).

266. *Id.* at 1280-81.

267. *Id.* at 1281.

268. *Id.* at 1282.

269. *Id.*

270. 922 N.E.2d 59 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 794 (Ind. 2010).

271. *Id.* at 60.

272. *Id.*

273. *Id.*

274. *Id.* at 61.

275. *Id.* at 60.

276. *Id.* at 61.

grounds made evaluation of the parties' equal protection claim unnecessary.²⁷⁷

Notably, though, the court gave added instructions on remand. Specifically, the court noted that a birth mother should be presumed to be the biological mother of a child.²⁷⁸ The court also held that establishing maternity in a woman other than the birth mother must require clear and convincing evidence beyond a stipulation or agreed entry among the parties.²⁷⁹

C. Genetic Testing in Paternity Matters Is Not Categorical

In *Schmitter v. Fawley*,²⁸⁰ the Indiana Court of Appeals considered whether a trial court properly dismissed a pending paternity action and request for genetic testing. The mother had filed a paternity action against the putative father in 1973 to determine the paternity of the child.²⁸¹ The putative father succeeded in having the matter continued based on his ongoing military service in the Vietnam War.²⁸² Then in 1975, the mother married a different man, and her new husband successfully petitioned to adopt the child.²⁸³ Decades later, in 2009, the thirty-five-year-old child and mother filed a petition for the original paternity action to proceed.²⁸⁴ The putative father responded with a motion to dismiss and for summary judgment. The mother and child then filed a motion for genetic testing to determine paternity. After a hearing, the trial court granted the putative father's motion for dismissal and summary judgment and denied the motion for genetic testing.²⁸⁵ The mother and child appealed.

The court reviewed applicable adoption statutes and case law and recited that the finalization of adoption terminates pre-existing parental rights and obligations.²⁸⁶ In the court's view, "assuming that . . . [the husband's] adoption of . . . [the child] was valid, it terminated all duties and obligations that . . . [the putative father] might ever potentially have had . . . as his putative biological father."²⁸⁷ However, the mother and child also challenged the validity of the husband's adoption. They claimed it was invalid because the judge pro tempore who signed the adoption decree was the putative father's attorney in the paternity matter.²⁸⁸ While the court acknowledged that perhaps there should have been a recusal, this irregularity made the adoption voidable at most—not void.²⁸⁹ The

277. *Id.* at 62 n.4.

278. *Id.* at 62.

279. *Id.*

280. 929 N.E.2d 859 (Ind. Ct. App. 2010).

281. *Id.* at 860.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *See id.* at 861.

287. *Id.*

288. *Id.*

289. *Id.* at 861-62.

court was further swayed by the issue of estoppel, as the irregularity had not been raised by the mother and child for thirty-five years.²⁹⁰

The mother and child further argued that they were statutorily entitled to genetic testing regardless of the dismissal of the paternity action.²⁹¹ In support of their argument, they relied upon statutory language in Indiana Code section 31-14-6-1, which states that “[u]pon the motion of any party, the court shall order . . . genetic testing.”²⁹² The mother and child argued that because they filed their motion prior to dismissal of the matter, the trial court was obligated to grant it.²⁹³ The court concluded that this would be an unmanageable construction of the statute not intended by the Indiana General Assembly; it could subject individuals to genetic testing in vexatious paternity lawsuits, even where the action was promptly dismissed after commencement.²⁹⁴ Thus, the trial court’s grant of summary judgment in the putative father’s favor was affirmed, as was its denial of the motion for genetic testing.²⁹⁵

V. ADOPTIONS

Issues related to adoption occasionally arise in Indiana family law. The following section reviews several such noteworthy cases from the survey period.

A. Decree of Adoption Without Consent of Natural Father

In *In re Adoption of J.C.*,²⁹⁶ an unpublished decision accidentally published and later withdrawn from publication, the Indiana Court of Appeals considered the propriety of a decree of adoption issued by the trial court without consent of the natural father. In this case, the natural father and mother were parents to the child, born in November 2004.²⁹⁷ The parents separated in 2005, and the mother then married the adoptive father.²⁹⁸ During their marriage, the natural father provided care to the child. Upon separation, the mother did not allow the natural father to see the child until visitation was established through the trial court. The natural father’s last visitation occurred in February 2008.²⁹⁹ After that time, the natural father made no attempt to communicate directly with the child, and the mother had only sporadic contact with the natural father.

290. *Id.* at 862-63.

291. *Id.* at 862.

292. IND. CODE § 31-14-6-1 (2011); *Schmitter*, 929 N.E.2d at 862.

293. *Schmitter*, 929 N.E.2d at 862.

294. *Id.* at 862-63.

295. *Id.* at 863.

296. 919 N.E.2d 1230 (Ind. Ct. App. 2010), *depublished* by 2010 Ind. App. LEXIS 512 (Ind. Ct. App. Mar. 23, 2010), *reh’g denied sub nom.* J.C. v. T.C., 2010 Ind. App. LEXIS 523 (Ind. Ct. App. Mar. 24, 2010). For purposes of this Article, the cited material was taken from *In re Adoption of J.C.*, No. 27C01-0808-AD-15, at *1 (Ind. Ct. App. Jan. 22, 2010).

297. *Id.* at *2.

298. *Id.*

299. *Id.*

The natural father was ordered to pay eighty dollars per week in child support.³⁰⁰ He made these payments for three months in 2006 and for approximately three months in 2007.³⁰¹ After October 2007, he failed to fulfill any of his child support obligations and was incarcerated twice for failing to meet these obligations.³⁰² Evidence was also presented that the natural father did not take advantage of the full visitation time he was granted, and all visitation ceased after February 14, 2008.³⁰³ The natural father was subsequently incarcerated for burglary in July 2008 and has a scheduled release date of January 2012.³⁰⁴ During his incarceration, the natural father attempted to contact the child by sending cards and having a Christmas present delivered, which the mother refused to retrieve.³⁰⁵

In August 2008, the adoptive father filed his petition for adoption with the consent of the mother.³⁰⁶ In May 2009, the trial court entered its decree of adoption, finding that prior to his incarceration, the natural father “had the ability to provide for [the child] and failed to do so.”³⁰⁷ The trial court found that the natural father had made no substantial contact with the child in some time and no contact whatsoever since February 2008.³⁰⁸ Moreover, the natural father’s acts of sending cards and a present were “characterized as token efforts.”³⁰⁹ Therefore, the trial court concluded that the natural father had abandoned the child and his consent to the adoption was not required.³¹⁰ The natural father appealed; he asserted that the trial court erred when it concluded that his consent was not required under Indiana Code section 31-19-9-8(b).³¹¹

On appeal, the court stated, “Indiana Code section 31-19-11-1 provides that the trial court ‘shall grant the petition for adoption and enter an adoption decree’ if the court hears evidence and finds, in part, that ‘proper consent, if consent is necessary, to the adoption has been given.’”³¹² The court found that the evidence supported a finding that the natural father failed to provide financial support to the child and that there was a lack of substantial contact.³¹³ The court stated, “In order to preserve the consent requirement for adoption, the level of communication with the child must not only be significant, but it must also be more than ‘token efforts’ on the part of the parent to communicate with the

300. *Id.* at *3.

301. *Id.*

302. *Id.*

303. *Id.* at *2-3.

304. *Id.* at *3.

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* at *3-4.

311. *Id.* at *4.

312. *Id.* at *4-5 (quoting IND. CODE § 31-19-11-1(a) (2011)).

313. *Id.* at *5.

child.”³¹⁴ The court determined that imprisonment on its own is not statutory abandonment per se, but it also does not “constitute justifiable reason for failing to maintain significant communication with one’s child.”³¹⁵ Thus, the court concluded that the trial court properly determined that the natural father’s consent was not required for adoption of his minor child.³¹⁶

B. Adoption by Grandparent Without Divesting Parental Rights

In *In re Adoption of A.M.*,³¹⁷ the Indiana Court of Appeals considered whether the trial court erred in denying a grandfather’s uncontested petition to adopt his grandchild without divesting the mother of her parental rights. The child was born in 2005; in 2009, the mother’s father—the grandfather—filed a petition to adopt the child, reciting therein that the mother joined the petition and that she was not relinquishing her parental rights.³¹⁸ The child’s father filed consent to the proposed adoption separately. Subsequently, the trial court issued an order granting the grandfather’s adoption and expressly noting that the mother’s parental rights were not terminated by the adoption.³¹⁹

However, several weeks later, the trial court vacated the adoption order sua sponte, reciting that the order was granted in error, and set the matter for a hearing.³²⁰ The grandfather filed a motion to correct the error, which the trial court heard. Afterwards, the trial court issued an order denying the grandfather’s motion, therein referencing Indiana Code section 31-19-15-1 for the proposition that permitting the mother to retain parental rights in the course of granting the grandfather’s adoption was not permitted by the statute.³²¹ The grandfather appealed.

The court of appeals reviewed the applicable statute, which generally provides that biological parents are relieved of their rights and obligations upon the granting of an adoption, subject to two statutory exceptions:

- (a) If the adoptive parent . . . is married to a biological parent . . . ; (b) After the adoption, the adoptive father or mother, or both . . . occupy the same position toward the child that the adoptive father or adoptive mother, or both, would occupy if the adoptive father or adoptive mother, or both, were the biological father or mother; and . . . are jointly and severally liable for the maintenance and education of the person.³²²

The court also reviewed the substantial body of case law dealing with adoption

314. *Id.* at *6 (quoting *Rust v. Lawson*, 714 N.E.2d 769, 772 (Ind. Ct. App. 1999)).

315. *Id.* at *7 (quoting *Lewis v. Roberts*, 495 N.E.2d 810, 813 (Ind. Ct. App. 1986)).

316. *Id.* at *8-9.

317. 930 N.E.2d 613 (Ind. Ct. App. 2010).

318. *Id.* at 614.

319. *Id.*

320. *Id.* at 614-15.

321. *Id.* at 615.

322. *Id.* at 618 (quoting IND. CODE § 31-19-15-2 (2011)).

and the best interests of the adopted child. The record was uncontroverted that although the mother and grandfather did not live together, they lived about fifteen minutes apart, and the child spent almost every other weekend with the grandfather (as well as three to four other visits per week).³²³ In other words, the mother and grandfather were essentially co-parenting the child.

The court concluded that the child's best interests would be served by permitting adoption by the grandfather without divesting the parental rights of the mother.³²⁴ Further, to the extent that a literal application of the statute would not permit this outcome, this would be an "absurd result" that ignored the overarching objective of serving the best interests of the child.³²⁵ Thus, the denial of the adoption was reversed and the matter remanded for further consistent proceedings.³²⁶

Judge Najam filed a dissenting opinion to argue that the adoption statute permits adoption by only a limited class of persons: single adults, married couples, and stepparents.³²⁷ He therefore would have affirmed the trial court.³²⁸ In his view, the statute was based on policy decisions enacted by the legislature and should be followed even if the best interests of the child might suggest a different result to the trier of fact.³²⁹

C. Role of Department of Child Services in Foster Parents' Adoptions

In *In re Adoption of H.L.W., Jr.*,³³⁰ the court considered whether the trial court erred in granting an adoption in favor of the foster parents based in part upon a finding that consent to the adoption by DCS was unnecessary. In this case, the child was born out of wedlock in 2006, at which time the child tested positive for various drugs.³³¹ The mother admitted to drug use; after giving birth, she checked herself out of the hospital against medical advice but did not take the child with her.³³² Several days later, the mother returned to the hospital with the father and completed paperwork designating the father as the putative father.³³³

DCS promptly took the child from the hospital, placed him in foster care, and filed a child in need of services (CHINS) petition.³³⁴ The trial court ordered that the child remain a ward of DCS and in foster care.³³⁵ The mother remained

323. *Id.* at 621.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at 621-22 (Najam, J., dissenting).

328. *Id.* at 622.

329. *Id.*

330. 931 N.E.2d 400 (Ind. Ct. App. 2010).

331. *Id.* at 402.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

uncooperative, and upon DCS's motion, the trial court terminated her parental rights. Nevertheless, the goal of the CHINS action plan was reunification of the child and father.³³⁶ The trial court issued an order requiring the father to visit the child, submit to drug testing, complete various follow-ups and evaluations, remain employed and drug-free, and establish paternity.³³⁷

In July 2006, the father established paternity and was ordered to pay child support of \$41 per week to DCS.³³⁸ The father's construction business subsequently suffered, and he made no support payments between mid-November 2006 and late November 2007.³³⁹ Although the father was inconsistent in paying support, he eventually brought himself into compliance with the other expectations of the trial court, and his visitation with the child increased from supervised to unsupervised in 2009.³⁴⁰ DCS eventually recommended reunification of the father and the child.

Nevertheless, the foster parents filed a petition to adopt the child in the same trial court where the CHINS case was pending. The father and DCS filed objections to the adoption. Hearings were held, after which the trial court issued an order granting the foster parents' adoption.³⁴¹ The trial court concluded, in pertinent part, that DCS's consent to the adoption was not necessary because DCS was not withholding consent in the best interests of the child and, further, that the father's failure to pay child support for a year meant that the father's consent to the adoption was not required.³⁴² The father and DCS appealed.

The court initially undertook a lengthy analysis of whether it was jurisdictionally appropriate for the same trial court to approve the CHINS reunification plan and then adjudicate the adoption issue.³⁴³ In the end, the court concluded that it was "persuaded that the consent statutes . . . enable[d] the trial court to consider the adoption proceeding despite the pending CHINS action."³⁴⁴

Next, the court considered the argument set forth by DCS that the trial court erroneously concluded that DCS consent to the adoption was unnecessary. The Indiana Code generally provides that written consent to the adoption of a minor is required by an agency having lawful custody of the child.³⁴⁵ However, excepted from that general requirement are legal custodians who "failed to consent to the adoption for reasons found by the court not to be in the best interests of the child."³⁴⁶

The trial court had concluded that DCS was not acting in the best interests

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* at 403.

342. *Id.*

343. *Id.* at 403-08.

344. *Id.* at 407-08.

345. *Id.* at 408.

346. *Id.* (quoting IND. CODE § 31-19-9-8(a) (2011)).

of the child by withholding consent to the adoption.³⁴⁷ In support of this conclusion, the detailed findings of the trial court indicated that DCS failed to present any evidence that the foster parents were unfit.³⁴⁸ However, the appellate court concluded that the trial court had applied the wrong standard. In fact, DCS had no burden to prove the foster parents' lack of fitness.³⁴⁹ Instead, the correct standard was "whether DCS proved by clear and convincing evidence that its withholding of consent to the adoption was in [the] [c]hild's best interests."³⁵⁰ Reviewing the totality of the evidence presented, the court of appeals concluded that DCS met this burden; as such, it was improper to have granted the adoption without DCS's consent.³⁵¹

In sum, the trial court had the jurisdictional ability to hear the CHINS processing and the adoption matter simultaneously.³⁵² However, it erred in concluding that DCS's consent to the adoption was unnecessary.³⁵³ Because DCS's consent was required, but withheld, the adoption in favor of the foster parents was reversed.³⁵⁴ Because the case was resolved on these grounds, the court did not reach the father's sole claim on appeal, which was that the trial court erred in concluding that his consent was not required because of his failure to pay child support.³⁵⁵

CONCLUSION

This Article reviews developments in Indiana's family and matrimonial law, including many notable cases and several fundamental modifications to the Indiana Child Support Guidelines. These decisions and modifications will impact future cases involving topics such as dissolution of marriage, child custody, support, relocation, paternity, and adoption.

347. *Id.*

348. *Id.* at 408-09.

349. *Id.* at 409.

350. *Id.*

351. *Id.* at 410.

352. *Id.*

353. *Id.* at 410-11.

354. *Id.* at 411.

355. *Id.*

SURVEY OF RECENT DEVELOPMENTS IN HEALTH CARE LAW

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INTRODUCTION

Arguably, no other period since the adoption of the Social Security Act in 1965 has seen more developments in health care law than 2009-10. Health care is always an evolving and changing body of law at both the state and federal levels. But 2010 saw President Obama sign the Patient Protection and Affordable Care Act into law—a truly sweeping change in our nation’s health care system. Although not an exhaustive review, this Survey summarizes many of the recent and more significant developments in various areas of health law, including fraud and abuse, labor and employment, tax, health information technology, and privacy rights.

I. HEALTH CARE REFORM

The Patient Protection and Affordable Care Act¹ and the Health Care and Education Reconciliation Act of 2010² are the result of a decade-long effort by various interests to reform the United States health care system (referred to collectively as the “PPACA”). In what began life as a campaign promise of President Obama, then taking on several iterations before being signed into law on March 23, 2010, the PPACA is a true behemoth of federal legislation. Generally speaking, the PPACA was designed to target the areas of access, cost, and quality.³

Although the legislative process for such expansive legislation may have outwardly seemed efficient given the compressed time period in which the PPACA was adopted, it was not without controversy. Namely, there was significant dispute regarding whether there would be a public health insurance option, how health insurance exchanges would be structured, concerns over federal funding for abortion coverage, and the use of circuitous parliamentary

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 42 U.S.C. §1320a-7a).

2. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

3. While the cited policy and legislative bases are numerous, the Obama administration generally touts the laws as giving all Americans “better health security by putting into place comprehensive health insurance reforms that help to hold insurance companies accountable, lower health care costs, guarantee more choice, and enhance the quality of care for all Americans.” U.S. DEP’T. OF HEALTH & HUMAN SERVS., THE AFFORDABLE CARE ACT—WHAT IT MEANS FOR YOU 1 (2010), *available at* http://www.healthcare.gov/center/brochures/for_you.pdf.

procedure. In the end, the PPACA was adopted relying solely on Democrat support.⁴

The PPACA contains significant expansions of health care access and insurance coverage for most Americans and adds numerous provisions that address federal health care program integrity and reimbursement restructuring. While this survey focuses on many developments in health care law (as they may impact providers), many provisions of the law reach beyond providers.⁵ Significant provisions include the following:

- (1) increased access and coverage to health care through various insurance market reforms ranging from a prohibition on lifetime coverage limits, insurance rescission, and preexisting condition exclusion;⁶
- (2) creation of American Health Benefit Exchanges and Small Business Health Options Program Exchanges in each state to facilitate individual and small employers to purchase qualified health plans;⁷
- (3) penalties for individuals who fail to have minimum essential health insurance coverage for themselves or their dependents;⁸
- (4) significant expansion of individuals eligible for coverage under Medicaid;⁹
- (5) accelerated Medicare and Medicaid reimbursement reform;¹⁰
- (6) narrowed definition of the so-called Medicare Part D drug benefit “donut hole”;¹¹
- (7) significant improvements in health care workforce development;¹² and
- (8) enhancement and extension of the federal government’s fraud and abuse capabilities and providers’ program integrity obligations.¹³

As may be expected with legislation that is both far-reaching and controversial, many legal challenges followed the PPACA’s enactment. During the preparation of this Survey, no fewer than twenty seven states sued or joined in litigation

4. See *U.S. Senate Roll Call Votes 111th Congress—1st Session*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396 (last visited Aug. 2, 2011) (showing voting summary for the PPACA).

5. Given the scope and breadth of the PPACA, this Survey focuses on many of the more significant provisions that impact health care providers of all types and does not discuss many provisions within the PPACA such as insurance market reform, affordability of coverage, Medicare Part D improvements, disease prevention, and wellness, among others.

6. See generally Patient Protection and Affordable Care Act §§ 1101-05.

7. *Id.* §§ 1301-43.

8. *Id.* §§ 1501-15.

9. *Id.* §§ 2001-07.

10. *Id.* §§ 2001-07, 3001-27.

11. *Id.* §§ 2301-04.

12. *Id.* §§ 5001-701.

13. *Id.* §§ 6001-801.

against the federal government challenging the constitutionality of PPACA—with others, including the U.S. Supreme Court, expected to also intervene.¹⁴ Constitutional scholars appear to be evenly split on the merits and likelihood of success of these challenges, which are based substantially on whether the individual mandate to obtain minimum essential health insurance coverage is constitutional.

II. FRAUD & ABUSE

A. *Expansion of the False Claims Act*

2009 ushered in many changes to health care fraud and abuse laws, the most significant of which can be found in the federal False Claims Act (FCA).¹⁵ The FCA is the most widely utilized enforcement tool of the Department of Justice. On May 20, 2009, the strength of the FCA was enhanced by the passage of the Fraud Enforcement and Recovery Act (FERA).¹⁶ Some of the key impacts that FERA had on the FCA include:

1. *Obligation to Repay.*—Before the passage of FERA, there was much debate over what constituted an obligation to repay funds. FERA clarifies that failure to repay any known overpayment constitutes a false claims violation.¹⁷ The PPACA further clarified what constitutes an obligation to repay by defining “obligation” to require the return of all known overpayments within sixty days of the identification of the overpayment.¹⁸

2. *Reverse False Claim.*—One of the most significant changes of FERA is the establishment of the “reverse false claim.” Ignoring or decreasing an obligation to repay monies owed to the government now constitutes a false claim.¹⁹

3. *Request for Payment Does Not Need to Be Submitted Directly to the Government.*—FERA clarifies that a party does not need to submit a claim directly to, or deal directly with, the federal government in order to trigger a violation of the FCA. Rather, the FCA is triggered whenever a person knowingly makes a false claim to obtain money or property—any part of which is provided by the government—without regard to whether the wrongdoer deals directly with the federal government, with an agent acting on the government’s behalf, or with a third-party contractor, grantee or other recipient of such money or property.²⁰ Previously, a claim needed to be presented to an officer or employee of the

14. See *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, No. 3:10-CV-91-RV/EMT, 2011 WL 723117 (N.D. Fla. Mar. 3, 2011); see also *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010).

15. False Claims Act, 31 U.S.C. §§ 3729-31 (West, Westlaw through 2011 legislation).

16. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-121, 123 Stat. 1617.

17. 31 U.S.C. § 3729(b)(1)-(3) (West, Westlaw through 2011 legislation).

18. Patient Protection and Affordable Care Act § 1128J(d)(2).

19. 31 U.S.C. § 3729(a)(1)(G).

20. *Id.* § 3729(a)(1)(D).

federal government in order for the FCA to be triggered. It remains to be seen how far downstream the government will reach into a financial relationship involving federal funds to allege a violation of the FCA.

4. *Eliminating the Defenses.*—As indicated above, prior to the enactment of FERA, a claim needed to be submitted directly to the federal government in order for the FCA to be triggered. The requirement that the claim be submitted directly to the government served as the basis for the intent requirement in the U.S. Supreme Court decision *Allison Engines Co. v. United States ex rel. Sanders*.²¹ FERA clarifies that a statement only needs to have a “natural tendency to influence, or be capable of influencing,”²² the payment of government funds.

5. *Whistleblower Protections.*—The whistleblower protections under the FCA were greatly expanded to cover not only employees, but also contractors or agents. Specifically, 31 U.S.C. § 3730(h) now provides that

[a]ny employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action under this section or other efforts to stop . . . [one] or more violations²³

This revision goes to the underlying purpose of FCA, which is to foster the disclosure of fraud and abuse.²⁴

There are still many open issues with regard to how the FCA will be interpreted. For example, FERA does not establish when a payment becomes a “known” overpayment, prompting the following question: is it the point when the parties discover the potential overpayment? Further, if due to a Stark violation, is it when the potentially noncompliant relationship is discovered, or is it after the parties complete their research and affirmatively conclude that a Stark violation occurred? Additionally, the process for establishing a repayment has not yet been determined.

B. *OIG'S Exclusionary Authority*

Under Section 1128 of the Social Security Act (SSA), the Office of Inspector General (OIG) has the ability to exclude entities and individuals from participating in federal health care programs via mandatory and permissive

21. 553 U.S. 662, 668 (2008) (“Eliminating this element of intent, as the [c]ourt of [a]ppeals did, would expand the FCA well beyond its intended role of combating ‘fraud against the [g]overnment.’”).

22. False Claims Act, 31 U.S.C. § 3729(b)(4) (West, Westlaw through 2011 legislation).

23. 31 U.S.C. § 3730(h)(1) (2010).

24. See, e.g., *Why the False Claims Act?*, FALSE CLAIMS ACT LEGAL CTR., <http://www.taf.org/whyfca.htm> (last visited Aug. 2, 2011).

exclusionary authority.²⁵ The SSA identifies criteria that, if met, are grounds for exclusion from participation in federal health care programs.²⁶ Mandatory criteria generally include convictions of patient abuse or neglect, felonies relating to health care fraud, and criminal offenses related to Medicare or state health care programs.²⁷ The permissive criteria under the SSA give the OIG the ability to exclude individuals and entities for a number of reasons.²⁸ The PPACA expands the list of permissive criteria that may be considered, as outlined below.

First, a new subsection was added to 42 U.S.C. 1320a-7(b), permitting the OIG to exclude

[a]ny individual or entity that knowingly makes or causes to be made any false statement, omission, or misrepresentation of a material fact in any application, agreement, bid, or contract to participate or enroll as a provider of services or supplier under a Federal health care program . . . and entities that apply to participate as providers of services or suppliers in such managed care organizations and such plans.²⁹

Section 1128(c)(3)(B) of the SSA addresses when an exclusion may go into effect. It also outlines the duration of the exclusion and grants the Secretary of Health and Human Services (the “Secretary”) the ability to grant a waiver exclusion under certain circumstances.³⁰ Prior to the PPACA, this section waived the provider’s exclusion if it could be demonstrated that the exclusion would impose a hardship on beneficiaries under Medicare Parts A or B.³¹ Now, the exception applies if the exclusion would impose hardship on beneficiaries under any federal health care program,³² thus broadening the exclusion exception.

Section 1128(b)(11) of the SSA formerly allowed the Secretary to exclude

[a]ny individual or entity furnishing items or services for which payment may be made under subchapter XVIII of this chapter or a State health care program that fails to provide such information as the Secretary or the appropriate State agency finds necessary to determine whether such payments are or were due and the amounts thereof, or has refused to permit such examination of its records by or on behalf of the Secretary or that agency as may be necessary to verify such information.³³

The PPACA broadens the scope of this statute to apply not only to the entity

25. 42 U.S.C. § 1320a-7 (2010).

26. *Id.* § 1320a-7(a)(1)-(4).

27. *Id.*

28. *Id.* § 1320a-7(b)(1)-(16).

29. *Id.* § 1320a-7(b)(16); *see also* Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 5001-701, 124 Stat. 119 (2010) (to be codified at 42 U.S.C. § 1320).

30. 42 U.S.C. § 1320a-7(c)(3)(B).

31. *See* JOHN T. BRENNAN, JR. & ROBERT G. HOMCHICK, FRAUD AND ABUSE IN HEALTH CARE REFORM 2-3 (2010).

32. Patient Protection and Affordable Care Act § 6402(k).

33. 42 U.S.C. § 1320a-7(b)(11) (2006).

furnishing the service, but to persons “ordering, referring for furnishing, or certifying the need for items or services for which payment may be made” under a federal or state health care program.³⁴ This amendment is effective for any referrals, orders, and certifications made on or after January 1, 2010.³⁵

Section 6408(c) of the PPACA amended 42 U.S.C. § 1320a-7(b)(2) of the SSA, which gives the OIG the ability to exclude an “individual or entity that has been convicted, under Federal or State law, in connection with the interference with or obstruction of any investigation” into a criminal offense related to health care fraud, or those activities that constitute grounds for mandatory exclusion.³⁶ This provision was revised to apply not only to criminal investigations, but also to investigations regarding the “use of funds received, directly or indirectly, from any Federal health care program.”³⁷

C. Stark Law Update

The federal Stark Law prohibits a physician from making a referral to an entity for the furnishing of certain “designated health services” (DHS)³⁸ for which payment may be made under Medicare if such physician (or the immediate family member of such physician) has a “financial relationship” with the DHS entity, unless an exception applies.³⁹ Further, the DHS entity may not bill Medicare for DHS furnished pursuant to a prohibited referral, unless one of the Stark exceptions applies.⁴⁰

1. *Overview.*—As part of the PPACA, the Centers for Medicare and Medicaid Services (CMS) recently released final regulations implementing several changes to the federal Stark Law. First, the PPACA amended the Stark Law to further restrict the ability of physicians to own an interest in hospitals to which they refer.⁴¹ Second, the PPACA amended the Stark Law’s in-office ancillary services exception by adding new patient disclosure requirements.⁴² The PPACA also established a new “self-referral disclosure protocol” for actual or potential Stark Law violations.⁴³

2. *Changes to Physician-Owned Hospital Exceptions.*—Section 6001(a)(3) of the PPACA recommended a new § 1877(i) to the SSA, imposing a number of

34. Patient Protection and Affordable Care Act § 6406(c).

35. *Id.* § 6406(d).

36. 42 U.S.C. § 1320a-7(b)(2) (2010).

37. Patient Protection and Affordable Care Act § 6408(c).

38. 42 U.S.C. § 1395nn(h)(6) (West, Westlaw current through 2011). The term “designated health services” includes such items as radiology, clinical laboratory services, physical and occupational therapy services, inpatient and outpatient hospital services, and durable medical equipment and supplies. *Id.*

39. *See generally id.*

40. *Id.*

41. Patient Protection and Affordable Care Act § 6001.

42. *Id.* § 6003.

43. *Id.* § 6409(a)(1).

new requirements for a hospital to meet in order to qualify for an exception to the prohibition of physician ownership of rural providers and hospitals.⁴⁴ Most notably, this addition prohibits expansion of physician-owned hospitals that rely on the “whole hospital” or “rural provider” exceptions in order to comply with the law.⁴⁵ CMS recently issued the final regulations implementing these changes to the “whole hospital” and “rural provider” exceptions.⁴⁶ Hospitals must be in compliance with the requirements below no later than September 23, 2011.⁴⁷ Notably, the PPACA provided for requirements to be put into place that would permit expansion of certain applicable hospitals and high-Medicaid facilities to be implemented by August 1, 2011,⁴⁸ but CMS has not yet issued final regulations implementing such requirements.

a. General requirements.—The following general requirements have accompanied the changes to this portion of the law:

(1) The hospital must have been physician-owned as of December 31, 2010 with a valid Medicare provider agreement in effect as of such date.⁴⁹

(2) The hospital is not permitted to increase the number of operating rooms, procedure rooms, and beds beyond the number for which it was licensed as of March 23, 2010 (or, in the case of a hospital that did not have a provider agreement in effect after such date but before December 31, 2010, the effective date of such agreement).⁵⁰ “Procedure room means a room in which catheterizations, angiographies, angiograms, and endoscopies are performed, except such term shall not include an emergency room or department (exclusive of rooms in which catheterizations, angiographies, angiograms, and endoscopies are performed).”⁵¹

(3) The hospital cannot have previously operated as an ambulatory surgical center and converted to a hospital on or after March 23, 2010.⁵²

b. Conflicts of interest.—To address conflicts of interest, the following changes were also proposed:

44. *Id.* § 6001(a)(3).

45. *Id.*

46. *See* Regulations Ensuring Bona-Fide Investment, 75 Fed. Reg. 72,249, 72,249-56 (Nov. 24, 2010); Exceptions to the Referral Prohibition Related to Ownership or Investment Interests, 75 Fed. Reg. 72,260, 72,260 (Nov. 24, 2010) (citing 42 C.F.R. § 411.356(3)(iv) (2011)).

47. Exceptions to the Referral Prohibition Related to Ownership or Investment Interests, 75 Fed. Reg. at 72,260.

48. Patient Protection and Affordable Care Act § 6001(a)(3)(A)(iii).

49. Additional Requirements Concerning Physician Ownership and Investment in Hospitals, 75 Fed. Reg. 72,260, 72,260 (citing 42 C.F.R. § 411.362(b)(1)).

50. *Id.* (citing 42 C.F.R. § 411.362(b)(2)).

51. *Id.* (citing 42 C.F.R. § 411.362(a)).

52. *Id.* at 72,261(citing 42 C.F.R. § 411.362(b)(6)).

(1) In order to protect patients from a potential conflict of interest arising from ownership by referring physicians, CMS will require each hospital to submit a report on an annual basis describing the identity of ownership and the nature and extent of all physician ownership in the hospital.

(2) Not later than September 23, 2011, the hospital must require physician-owners to disclose in writing to patients referred to the hospital such ownership or investment interest in the hospital as a condition of medical staff membership. Such disclosure shall also include, if applicable, the ownership or investment interest of any treating physician. The required disclosure must be made at such time as to provide the patient the opportunity “to make a meaningful decision regarding the receipt of care” from such physician and hospital.⁵³

(3) The hospital cannot condition physician ownership or investment directly or indirectly on the physician “making or influencing referrals to the hospital or otherwise generating business for the hospital.”⁵⁴

(4) Not later than September 23, 2011, the hospital must provide disclosure of its physician ownership on the hospital website and in any public advertising.⁵⁵

c. Ensuring bona fide investment.—In order to show that a bona fide investment by physician-owners exists, the following criteria must be met:

(1) There may be no increase in the aggregate percentage of physician ownership or investment in the hospital (or in an entity whose assets include the hospital) from the percentage that existed as of March 23, 2010.⁵⁶

(2) A hospital may not offer ownership or investment in the hospital to a physician on more favorable terms than those which would be offered to non-physicians.⁵⁷

(3) The hospital (or any owner or investor in the hospital) does not provide loans or financing for investment in the hospital by a physician.⁵⁸

(4) The hospital (or any owner or investor in the hospital) does not guarantee a loan or make a payment toward a loan for any individual physician or group of physicians if the loan is geared toward acquiring any ownership or investment interest in the hospital.⁵⁹

(4) Distributions are made to owners or investors in the hospital in an

53. *Id.* (citing 42 C.F.R. § 411.362(b)(3)(ii)(A)).

54. *Id.* (citing 42 C.F.R. § 411.362(b)(3)(ii)(B)).

55. *Id.* (citing 42 C.F.R. § 411.362(b)(3)(ii)(C) (2011)).

56. *Id.* (citing 42 C.F.R. § 411.362(b)(4)(i)).

57. *Id.* (citing 42 C.F.R. § 411.362(b)(4)(ii)).

58. *Id.* (citing 42 C.F.R. § 411.362(b)(4)(iii)).

59. *Id.* (citing 42 C.F.R. § 411.362(b)(4)(iv)).

amount that is “directly proportional to the ownership or investment interest of such owner or investor in the hospital.”⁶⁰

(5) Physician owners or investors do not receive a guaranteed receipt of or right to purchase other business interests related to the hospital, such as real property.⁶¹

(6) “The hospital does not offer a physician owner or investor the opportunity to purchase or lease property . . . on more favorable terms than the terms offered to an individual who is not a physician.”⁶²

*d. Patient safety.*⁶³—With patient safety becoming an ever-increasing concern, the regulations address the issue as follows:

(1) Effective September 23, 2011, if a physician is not available on site at the hospital during all hours in which the hospital is providing patient care services, the hospital must disclose this information to the patient. Such disclosure (and written acknowledgement of the receipt of the disclosure by the patient) must be received prior to providing services to the patient.⁶⁴

(2) Effective September 23, 2011, the hospital must have the capacity to provide initial assessments and treatment for patients, and it must have made arrangements to refer or transfer patients who require other services not provided by that hospital.⁶⁵

3. *Physician Disclosure Requirements for MRI, CT, and PET.*—Section 6003 of the PPACA amended the federal Stark Law statutory exception for in-office ancillary services to require physicians to provide patients with written notice, at the time of the referral for certain imaging services, that such services may be obtained by a person or entity other than the physician or that physician’s group. Such imaging services include magnetic resonance imaging (MRI), computed tomography (CT), and positron emission tomography (PET), as well as other DHS as designated by the Secretary of Health and Human Services.⁶⁶ The PPACA further requires a referring physician to provide a list of alternate suppliers who provide these imaging services in the local area.⁶⁷ CMS recently issued the final regulations implanting these changes to the in-office ancillary services exception, effective January 1, 2011.⁶⁸

60. *Id.* (citing 42 C.F.R. § 411.362(b)(4)(v)).

61. *Id.* (citing 42 C.F.R. § 411.362(b)(4)(vi)).

62. *Id.* (quoting 42 C.F.R. § 411.362(b)(4)(vii)).

63. *Id.* (citing 42 C.F.R. § 411.362(b)(5)).

64. *Id.* (citing 42 C.F.R. § 411.362(b)(5)(i)).

65. *Id.* at 72,260-61 (citing 42 C.F.R. § 411.362(b)(5)(ii)).

66. Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 6003(a), 124 Stat. 119 (2010).

67. *Id.*

68. Disclosure Requirements for In-Office Ancillary Services Exception to the Prohibition on Physician Self-Referral for Certain Imaging Services, 75 Fed. Reg. 73,443, 73,443 (Nov. 29,

a. Services triggering disclosure.—As noted above, the PPACA provided that the new disclosure requirements apply to MRI, CT, and PET services as well as such other radiology or imaging services as the Secretary determines appropriate.⁶⁹ CMS declined to expand the list of services in the final regulations and limited the disclosure requirements to MRI, CT, and PET services that are “identified as ‘radiology and certain other imaging services’ on the [l]ist of DHS CPT/HCPCS [c]odes.”⁷⁰

b. Form/timing of notice.—The required notice “should be written in a manner sufficient to be reasonably understood by all patients” and be given to the patient “at the time of the referral.”⁷¹ Importantly, there is no exception to the disclosure requirement for MRI, CT, or PET services furnished on an “emergency or time-sensitive” basis.⁷² Where there are subsequent referrals for advance imaging services by such physician, separate notices must be provided to the patient.⁷³ If the referrals are by phone, the obligation to provide a written disclosure still exists, but it may be mailed or emailed to the patient once the patient has been notified verbally.⁷⁴

The notice must indicate to the patient that the services may be obtained from a person or entity other than the referring physician or physician’s group practice and include a list of other suppliers who provide the service being referred.⁷⁵

c. Types and number of suppliers.—Suppliers must be “located within a 25-mile radius of the physician’s office at the time of the referral” regardless of whether the office is in an urban or rural area, and the list must include no fewer than five alternative suppliers.⁷⁶ If there are not five other suppliers in the 25-mile radius, the physician must supply a list of all alternative imaging services providers within such area.⁷⁷ If there are no qualifying suppliers within this radius, the physician is not required to provide a list, but he must still notify the patient that the services may be provided by another supplier, and he must

2010); Financial Relationships Between Physicians and Entities Furnishing Designated Health Service, 75 Fed. Reg. 73,616, 73,616 (Nov. 29, 2010) (citing 42 C.F.R. § 411.355).

69. Patient Protection and Affordable Care Act § 6003(a).

70. General Exceptions to the Referral Prohibition Related to Both Ownership/Investment and Compensation, 75 Fed. Reg. at 73,616 (citing 42 C.F.R. § 411.355(b)(7)(i)); *see also Code List for Certain Designated Health Services (DHS)*, CTRS. FOR MEDICARE & MEDICAID SERVS., http://www.cms.gov/PhysicianSelfReferral/40_List_of_Codes.asp#TopOfPage (last visited Aug. 3, 2011).

71. Disclosure Requirement for Certain Imaging Services, 75 Fed. Reg. at 73,616 (citing 42 C.F.R. § 411.355(b)(7)(i)).

72. *See id.*

73. General Disclosure Requirements, 75 Fed. Reg. at 73,445.

74. *Id.*

75. Disclosure Requirement for Certain Imaging Services, 75 Fed. Reg. at 73,616 (citing 42 C.F.R. § 411.355(b)(7)(i)).

76. List of Alternate Suppliers, 75 Fed. Reg. at 73,445 (citing 42 C.F.R. § 411.355(b)(7)(i)).

77. *Id.* (citing 42 C.F.R. § 411.355(b)(7)(ii)).

document the disclosure.⁷⁸ The list of suppliers must include the “name, address, [and phone] number” of each supplier at the time of the referral.⁷⁹

*d. Documentation.*⁸⁰—No patient signature is required to document that the disclosure requirements have been satisfied.⁸¹ However, CMS advises that “physicians should be able to document or otherwise establish that they have complied with the disclosure requirement.”⁸²

4. CMS Issues Stark Law Voluntary Disclosure Protocol.—Section 6409 of the PPACA required the Secretary to develop a protocol, in cooperation with the Office of Inspector General (OIG) of the Department of Health and Human Services, to enable health care providers “to disclose an actual or potential violation of” the federal Stark Law.⁸³ On September 23, 2010, CMS published the Self-Referral Disclosure Protocol (the “Protocol”) online.⁸⁴

Importantly, the PPACA authorized the Secretary to reduce payment and penalty amounts for violations of the Stark Law.⁸⁵ In determining the amount due for a violation, the Secretary was instructed to consider (i) “[t]he nature and extent of the improper or illegal practice”; (ii) “[t]he timeliness of such self-disclosure”; (iii) the provider’s cooperation in supplementing information as needed; and (iv) any “other factors” the Secretary deems appropriate.⁸⁶

The PPACA also established a deadline for reporting and returning overpayments by the later of: (1) “[sixty] days after the date on which the overpayment was identified”⁸⁷ or (2) “the date any corresponding cost report is due, if applicable.”⁸⁸ Importantly, such sixty-day period is tolled at the time the provider receives e-mail confirmation from CMS that the disclosure has been received.

a. In general.—The Protocol is available to all health care providers and suppliers (collectively, “Disclosing Parties”), including Disclosing Parties already subject to government investigation.⁸⁹ Failure to fully cooperate in the self-disclosure process or “to circumvent an ongoing [government] inquiry” will result in removal from the Protocol.⁹⁰

78. *Id.*

79. *Id.* (citing 42 C.F.R. § 411.355(c)).

80. Documentation of Disclosure, 75 Fed. Reg. 73, 447 (Nov. 29, 2010).

81. *Id.*

82. *Id.*

83. Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 6409(a)(1), 124 Stat. 119 (2010).

84. CTRS. FOR MEDICARE & MEDICAID SERVS., CMS VOLUNTARY SELF-DISCLOSURE PROTOCOL, (2010), available at http://www.cms.gov/PhysicianSelfReferral/Downloads/6409_SRDP_Protocol.pdf [hereinafter SELF-REFERRAL DISCLOSURE PROTOCOL].

85. Patient Protection and Affordable Care Act § 6409(b).

86. *Id.* § 6409(b)(1)-(4).

87. *Id.* § 1125J(d)(2)(A).

88. *Id.* § 1128J(d)(2)(B).

89. SELF-REFERRAL DISCLOSURE PROTOCOL, *supra* note 84, at 2.

90. *Id.*

The Protocol is not intended as an advisory process by CMS or to determine “whether an actual or potential violation” of the Stark Law exists.⁹¹ Rather, submissions under the Protocol should be made to resolve liability for actual or potential violations.⁹²

CMS will review the circumstances surrounding the disclosed matter but “is not bound by any conclusions made by the [D]isclosing [P]arty under . . . [this protocol] and is not obligated to resolve the matter in any particular manner.”⁹³ Medicare contractors may be responsible for processing any identified overpayment, and Disclosing Parties must acknowledge “that no appeal rights attach to claims relating to the conduct disclosed if resolved through a settlement agreement.”⁹⁴ However, an appeal of any overpayment demand letter is permitted if the Disclosing Party withdraws or is removed from the Protocol.⁹⁵ Further, the reopening rules at 42 C.F.R., sections 405.980 through 405.986, shall apply if the Disclosing Party is denied acceptance into the Protocol, withdraws from the Protocol, or is removed from the Protocol by CMS.⁹⁶

2. *Cooperation with the OIG and the Department of Justice.*—The Protocol is limited to Stark Law violations.⁹⁷ Alternatively, “[t]he OIG’s Self-Disclosure Protocol is available for disclosing conduct that raises potential liabilities under other federal criminal, civil, or administrative laws.”⁹⁸ Conduct that raises liability risks under the Stark Law and under the OIG’s civil monetary penalty authorities, including the federal Anti-Kickback Statute, should be disclosed through the OIG’s self-disclosure protocol.⁹⁹ The same conduct should not be disclosed under both the Protocol and OIG’s self-disclosure protocol.¹⁰⁰ When appropriate, CMS may coordinate with the OIG and the Department of Justice (DOJ) to prepare a recommendation to such entities for the resolution of the False Claims Act, any civil monetary penalty, or other liability.¹⁰¹

If a Disclosing Party has a corporate integrity agreement (CIA) or certification of compliance agreement (CCA) with the OIG, disclosures shall comply with the terms of those agreements.¹⁰² “Effective September 23, 2010, a reportable event solely related to a Stark issue should be disclosed to CMS using the requirements set forth in this self-disclosure protocol with a copy [of the disclosure sent to the] [D]isclosing [P]arty’s OIG monitor.”¹⁰³

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *See id.*

98. *Id.*; *see also* Provider Self-Disclosure Protocol, 63 Fed. Reg. 58,399 (Oct. 30, 1998).

99. *See* SELF-REFERRAL DISCLOSURE PROTOCOL, *supra* note 84, at 2.

100. *Id.*

101. *Id.* at 3.

102. *Id.*

103. *Id.*

3. *Instructions Regarding the Voluntary Disclosure Submission.*—Disclosures pursuant to the Protocol must be sent to CMS electronically, along with the original disclosure and one additional copy sent by U.S. mail.¹⁰⁴ “After reviewing the submission, CMS will send a letter to the [D]isclosing [P]arty or its representative either accepting or rejecting the disclosure.”¹⁰⁵

The submission shall include a description of the actual or potential violation(s), including: identifying information of the Disclosing Party; a description of the nature of the matter being disclosed; a statement from the Disclosing Party regarding why it believes a violation may have occurred; circumstances under which the matter was discovered and measures taken upon discovery to address the issue; a statement identifying whether there is a history of similar conduct; descriptions of the existence and adequacy of a pre-existing compliance program; description of appropriate notices provided to other government agencies in connection with the disclosed matter; an indication of whether the Disclosing Party has knowledge that the matter is under current inquiry by a government agency or contractor, and a description of any such inquiry.¹⁰⁶

The Disclosing Party must also conduct a financial analysis that “[sets] forth the total amount . . . that is actually or potentially due and owing” based upon the period of time during which the Disclosing Party may not have been in compliance.¹⁰⁷ The Disclosing Party must also “[d]escribe the methodology used to set forth the amount that is actually or potentially due and owing” and “[p]rovide a summary of any auditing activity undertaken and a summary of the documents the [D]isclosing [P]arty . . . relied upon.”¹⁰⁸ Finally, the Disclosing Party must submit “a signed certification stating that, to the best of the individual’s knowledge, the information provided contains truthful information and is based on a good faith effort to bring the matter to CMS’[s] attention for purposes of resolving any potential liabilities”¹⁰⁹

4. *CMS Verification.*—“Upon receipt of a [D]isclosing [P]arty’s submission, CMS will begin its verification of the disclosed information.”¹¹⁰ The quality and thoroughness of the submission will determine CMS’s verification effort.¹¹¹ New issues identified during the verification process, which are outside the scope of the initial disclosure, may be treated as new matters outside the Protocol.¹¹² “CMS is prepared to discuss with a [D]isclosing [P]arty’s counsel ways to gain access to underlying information without waiver of protections provided by an

104. *Id.*

105. *Id.*

106. *Id.* at 3-4.

107. *Id.* at 5.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

appropriately asserted claim of privilege.”¹¹³

5. *Payments*.—“CMS will not accept payments of presumed overpayments determined by the [D]isclosing [P]arty prior to the completion of CMS’[s] inquiry.”¹¹⁴ During the verification process, “the [D]isclosing [P]arty must refrain from making payments relating to the disclosed matter to the Federal health care programs or their contractors without CMS’[s] prior consent.”¹¹⁵

6. *Cooperation and Removal from the Protocol and Timeliness of Disclosures*.—CMS expects to receive documents and information from the Disclosing Party voluntarily.¹¹⁶ Failure to cooperate with CMS during the disclosure process will be assessed during CMS’s consideration of the appropriate resolution of the matter.¹¹⁷ Intentional submission of false information or intentional omission of relevant information will be referred to the DOJ or other federal agencies.¹¹⁸

7. *Factors Considered in Reducing the Amounts Owed*.—In determining the amounts owed, CMS may consider the following factors:

(1) the nature and extent of the improper or illegal practice; (2) the timeliness of the self-disclosure; (3) the cooperation in providing additional information related to the disclosure; (4) the litigation risk associated with the matter disclosed; and (5) the financial position of the [D]isclosing [P]arty. While CMS may consider these factors in determining whether reduction in any amounts owed is appropriate, CMS is not obligated to reduce any amounts due and owing.¹¹⁹

D. Anti-Kickback Statute

The Medicare and Medicaid Patient Protection Act of 1987, as amended by 42 U.S.C. Section 1320a-7b (the “Anti-Kickback Statute”), prohibits the knowing and willful solicitation, receipt, offer, or payment of remuneration in exchange for or to induce the provision of items or services that are reimbursable under Medicare, Medicaid, or other government health care programs.¹²⁰ Prohibited remuneration may be direct or indirect, overt or covert, and made in cash or in kind.¹²¹ Violation of the Anti-Kickback Statute can result in both criminal and civil liability. The violation, which is considered a felony, can result in up to five

113. *Id.*

114. *Id.* at 6.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Medicare-Medicaid Anti-Fraud and Abuse Amendments, Pub. L. No. 95-142 § 4(b)(1), 91 Stat. 1175, 1181 (1977) (codified as amended at 42 U.S.C. § 1320a-7b (2010)).

121. *See generally id.*

years imprisonment, with fines up to \$25,000 and/or civil monetary penalties.¹²² Offenders may also be excluded from participation in Medicare, Medicaid, or other government health care programs.¹²³

1. *Overview.*—As demonstrated by the PPACA's sweeping impact on the Stark Law, the PPACA also made significant reforms to the Anti-Kickback Statute. First, the PPACA created a direct connection between violations of the Anti-Kickback Statute and a subsequent submission of a false claim.¹²⁴ Second, the PPACA amended the intent requirement under the Anti-Kickback Statute.¹²⁵ The PPACA also created a new statutory exception for prescription discounts for certain government health care beneficiaries.¹²⁶

2. *False Claims Correlation.*—The PPACA clarified that a violation of the Anti-Kickback Statute is considered a false or fraudulent claim.¹²⁷ The new 42 U.S.C. Section 1320(a)-7b(g) provision provides that “a claim that includes items or services resulting from a violation of . . . [the Anti-Kickback Statute] constitutes a false or fraudulent claim for purposes of . . . [the False Claims Act].”¹²⁸ Prior to this new language, violations of the Anti-Kickback Statute were argued to also evidence a false claim under the “implied certification” theory.¹²⁹ However, this theory is not infallible, given the knowledge requirement under the False Claims Act.¹³⁰ The new provision set forth by the PPACA further supports the notion that a violation of the Anti-Kickback Statute results in false claims.

3. *Changes in Intent Requirement.*—In interpreting the Anti-Kickback Statute, the OIG has historically relied on *United States v. Greber*,¹³¹ the landmark case regarding the scope of the Anti-Kickback Statute. In *Greber*, the Third Circuit Court of Appeals established the “one purpose” test.¹³² Under the “one purpose” test, “if one purpose of the payment was to induce future referrals, the [M]edicare statute has been violated.”¹³³ However, in *Hanlester Network v. Shalala*,¹³⁴ the Ninth Circuit Court of Appeals interpreted the Anti-Kickback

122. *Id.*

123. *Id.* § 1320a-7b(a)(6).

124. Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 6402(f)(1), 124 Stat. 119 (2010).

125. *See id.*

126. *See id.*

127. *See id.*

128. *Id.*

129. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 491 F. Supp. 2d 12, 18 (D. Mass. 2007) (stating that the “government can state a claim under the FCA for an antecedent violation of the Anti-Kickback Statute for claims submitted through the Medicare program” because the Medicare program requires providers to certify their Anti-Kickback Statute compliance).

130. *See* 31 U.S.C. § 3729 (2006).

131. 760 F.2d 68 (3d Cir. 1985).

132. *Id.* at 69.

133. *Id.*

134. 51 F.3d 1390 (9th Cir. 1995).

Statute to require “specific intent” to violate the law.¹³⁵ In *Hanlester*, the court found that the offender must have knowledge of the specific referral prohibitions contained in the Anti-Kickback Statute and violate the law with specific intent to do so.¹³⁶ The holding in *Hanlester* sharply contrasted the broader interpretation of intent under the Third Circuit’s holding in *Greber*.

The PPACA amended the actual language of the Anti-Kickback Statute, significantly diminishing this intent requirement and providing an additional means to establish a false claim.¹³⁷ Section 6402(f)(2) of the PPACA adds a new subsection, which states, “With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.”¹³⁸ The change to the intent requirement has effectively overruled *Hanlester*, as a party may now be held liable regardless of whether he or she has actual knowledge of the Anti-Kickback Statute or specific intent to violate the law. This amendment lessens the burden on the government to demonstrate a violation of the Anti-Kickback Statute and establish a false claim. Such changes to the intent threshold have the potential to increase both criminal and civil liability exposure with regard to many hospital and physician transactions.

4. *New Exception to the Anti-Kickback Statute.*—The PPACA also added a new exception to the Anti-Kickback Statute to permit prescription discounts for certain beneficiaries participating in Medicare’s coverage gap discount program.¹³⁹ The new exception states that the negotiated price of an applicable drug of a manufacturer that is furnished to an applicable beneficiary under the Medicare coverage gap discount program under section 1860D-14A, regardless of whether part of such costs were paid by a manufacturer under such program, will not be subject to the Anti-Kickback Statute.¹⁴⁰ For purposes of the new exception to the Anti-Kickback Statute, the PPACA also established new definitions, which include:

a. *Applicable beneficiary.*—The term “applicable beneficiary” means an individual who, on the date of dispensing an applicable drug . . . (A) is enrolled in a prescription drug plan or an MA-PD plan; (B) is not enrolled in a qualified retiree prescription drug plan; (C) is not entitled to an income-related subsidy under section 1860D-14(a); (D) is not subject to a reduction in premium subsidy under section 1839(i); and (E) who (i) has reached or exceeded the initial coverage limit under section 1860D-2(b)(3) during the year; and (ii) has not incurred costs for covered part D drugs in the year equal to the annual out-of-pocket

135. *Id.* at 1400.

136. *Id.*

137. Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 6402(f)(2), 124 Stat. 119 (2010).

138. *Id.*

139. Patient Protection and Affordable Care Act § 3301(c).

140. *Id.*

threshold specified in section 1860D-2(b)(4)(B).¹⁴¹

b. Applicable drug.—The term “applicable drug” means

with respect to an applicable beneficiary, a covered part D drug . . . (A) approved under a new drug application under section 505(b) of the Federal Food, Drug, and Cosmetic Act or, in the case of a biologic product, licensed under section 351 of the Public Health Service Act (other than a product licensed under subsection (k) of such section 351); and (B)(i) if the PDP sponsor of the prescription drug plan or the MA organization offering the MA-PD plan uses a formulary, which is on the formulary of the prescription drug plan or MA-PD plan that the applicable beneficiary is enrolled in; (ii) if the PDP sponsor of the prescription drug plan or the MA organization offering the MA-PD plan does not use a formulary, for which benefits are available under the prescription drug plan or MA-PD plan that the applicable beneficiary is enrolled in; or (iii) is provided through an exception or appeal.¹⁴²

E. Civil Monetary Penalties Law

Under the federal Civil Monetary Penalties (CMP) law, monetary sanctions may be imposed against any person who gives “remuneration” to a Medicare or Medicaid participant that the person knows or should know will likely influence the participant’s selection of a particular practitioner, provider, or supplier of a service paid for by Medicare or Medicaid.¹⁴³

1. Overview.—The PPACA made several sweeping changes to the CMP law. More specifically, Section 6402 of the PPACA clarifies the definition of “remuneration” as used in the administration of the CMP law.¹⁴⁴ The PPACA also created new civil monetary penalties and amended existing ones.

2. CMP Definition of Remuneration: New Exceptions.—Under the CMP law, any hospital that “knowingly makes a payment, directly or indirectly, to a physician [and any physician that receives such a payment] as an inducement to reduce or limit” items or services to Medicare or Medicaid beneficiaries under the physician’s direct care may be subject to civil monetary penalties.¹⁴⁵ “Remuneration” includes the provision or transfer of items or services “for other than fair market value.”¹⁴⁶ Nevertheless, the OIG has stated that providing “nominal” gifts is not likely to induce a beneficiary to use a particular provider, practitioner, or supplier.¹⁴⁷ The OIG interprets nominal value to include items

141. *Id.* § 1860D-14A(g)(1).

142. *Id.* § 1860D-14A(g)(1).

143. 42 U.S.C. § 1320a-7a(a) (2006).

144. Patient Protection and Affordable Care Act § 6402(d)(2)(B).

145. 42 U.S.C. § 1320a-7a(b).

146. *Id.* § 1320a-7a(i)(6).

147. See OFFICE OF INSPECTOR GEN., SPECIAL ADVISORY BULLETIN: OFFERING GIFTS AND OTHER INDUCEMENTS TO BENEFICIARIES 4 (2002), available at <http://oig.hhs.gov/fraud/docs/>

of value no greater than \$10 each and \$50 aggregated annually.¹⁴⁸ Given this interpretation, health care providers who provide charitable assistance to patients in excess of these monetary limits (e.g., free transportation, lodging, medication, gift cards for food and gasoline) may risk violation of the CMP law. In addition to this “nominal value” exception, there are several very narrow statutory and regulatory exceptions for: waiving cost-sharing amounts for those with financial need; disclosed health plan copayment differentials; items or services that promote the delivery of preventative care, as determined by CMS; practices authorized under the Anti-Kickback Statute; or waiving hospital outpatient copayments that exceed minimum copayments.¹⁴⁹

Section 6402(d)(2)(B) of the PPACA provides additional options for health care providers to offer certain charitable assistance or other items or services for free or below fair market value.¹⁵⁰ Notably, Section 6402(d)(2)(B) excludes from the definition of remuneration:

(1) items or services that promote access to care and pose a low fraud and abuse risk;

(2) offering items or services for free or less than fair market value, if the items or services consist of coupons, rebates, or other rewards from a retailer;

the items or services are offered or transferred on equal terms available to the general public, regardless of health insurance status; and

the offer or transfer of the items or services is not tied to the provision of other items or services reimbursed in whole or in part by the program under title XVIII or a State health care program (as defined in section 1128(h))”;¹⁵¹

(3) offering items or services for free or less than fair market value, if the items or services are not offered as part of any advertisement or solicitation;

the items or services are not tied to the provision of other services reimbursed in whole or in part by the program under title XVIII or a State health care program (as so defined);

there is a reasonable connection between the items or services and the medical care of the individual; and

the person provides the items or services after determining in good faith that the individual is in financial need.”¹⁵²

In light of these new exclusions, providers may have greater freedom to design a program aimed at assisting those in financial need or a program that

alertsandbulletins/SABGiftsandInducements.pdf.

148. *Id.* at 2.

149. *Id.*

150. Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 6402(d)(2)(B), 124 Stat. 119, 758-59 (2010) (to be codified at 42 U.S.C. §1320a-7a).

151. *Id.*

152. *Id.*

improves access to health care without risk of monetary penalties under the CMP law.

3. *New and Amended Civil Monetary Penalties in Section 6402 of the PPACA.*—Section 6402(d)(2) of the PPACA creates three new CMPs for the purpose of enhancing Medicare and Medicaid program integrity.¹⁵³ The PPACA also amended Section 1128A(a)(1)(D) of the CMP law.¹⁵⁴ As amended, the CMP law now includes the following additional CMPs:

a. *New section 1128A(a)(8).*—This section imposes CMPs on any person who “orders or prescribes a medical or other item or service during a period in which the person was excluded from a Federal health care program (as so defined),” when such person knows or should have known that a claim would be made under a Federal health care program.¹⁵⁵ The penalty for violating this new section 1128A(a)(8) is no more than \$10,000 per item or service, plus no more than three times the amount claimed for such item or service.¹⁵⁶

b. *New section 1128A(a)(9).*—This section imposes CMPs on any person who “knowingly makes or causes to be made any false statement, omission, or misrepresentation of a material fact in any application, bid, or contract to participate or enroll as a provider of services or a supplier under a Federal health care program (as so defined).”¹⁵⁷ Violations of this new CMP can result in penalties of no more than \$50,000 for each instance, plus no more than “[three] times the total amount claimed for each item or service for which payment was made based upon the application containing the false statement or misrepresentation of a material fact.”¹⁵⁸

c. *New section 1128A(a)(10).*—This section imposes CMPs on any person who “knows of an overpayment (as defined in paragraph (4) of section 1128J(d)) and does not report and return the overpayment in accordance with such section.”¹⁵⁹ The penalty for violating new section 1128A(a)(10) is no more than \$10,000 per item or service, plus no more than three times the amount claimed for such item or service.¹⁶⁰

d. *New section 1128J(d).*—Section 6402(a) of the PPACA created new section 1128J(d), which requires a person to “report and return the overpayment to the Secretary, the State, an intermediary, a carrier, or a contractor” and provide an explanation to the same entity as to why there was an overpayment.¹⁶¹ An “overpayment” is “any funds that a person receives or retains under title XVIII or XIX to which the person, after applicable reconciliation, is not entitled under

153. Patient Protection and Affordable Care Act § 6402(d)(2)(A).

154. *Id.*

155. Patient Protection and Affordable Care Act § 6402(d)(2)(A)(iii).

156. 42 U.S.C. § 1320a-7a(a) (2006).

157. Patient Protection and Affordable Care Act § 6402(d)(2)(A)(iii).

158. *Id.* § 6402(d)(2)(A)(iv)-(v).

159. *Id.* § 6402(d)(2)(A)(iii).

160. 42 U.S.C. § 1320a-7a(a)(10) (2006).

161. Patient Protection and Affordable Care Act § 6402(a).

such title.”¹⁶² For purposes of this new provision, the term “person” does not include beneficiaries.¹⁶³

The PPACA also amends section 1128A(a)(1)(D) of the CMP law, which imposes CMPs on persons who knowingly present, or cause to be presented, claims for items or services provided “during a period in which the person was excluded” pursuant to a determination by the Secretary under a list of statutory provisions.¹⁶⁴ The PPACA amends this provision by replacing the list of statutes with “from the Federal health care program (as defined in section 1128B(f)) under which the claim was made pursuant to Federal law.”¹⁶⁵ This amendment broadens the application of section 1128A(a)(1)(D) of the CMP law.

4. *New Civil Monetary Penalties in Section 6408 of the PPACA.*—Section 6408(a) of the PPACA creates new CMPs for false statements or delaying OIG inspections.¹⁶⁶ As amended, the CMP law now includes the following additional CMPs:

a. *New section 1128A(a)(8).*—This section imposes CMPs on any person who “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim for payment for items and services furnished under a Federal health care program.”¹⁶⁷

b. *New section 1128A(a)(9).*—This section imposes CMPs on any person who “fails to grant timely access, upon reasonable request . . . to the Inspector General of the Department of Health and Human Services, for the purpose of audits, investigations, evaluations, or other statutory functions of the Inspector General of the Department of Health and Human Services.”¹⁶⁸

c. *Penalties.*—The penalties imposed for violating these new CMPs are \$50,000 for each false record or statement under new section 1128A(a)(8) and \$15,000 for each day the person fails to grant timely access under new section 1128A(a)(9).¹⁶⁹

F. Office of Inspector General Work Plan for Fiscal Year 2010

On October 1, 2009, the OIG published its proposed Work Plan for Fiscal Year 2010 (“Work Plan”), which describes new and ongoing audit and enforcement priorities of the OIG.¹⁷⁰ Important focus areas for providers and suppliers include, but are not limited to:

1. *“Hospital Admissions with Conditions Coded Present-on-Admission*

162. *Id.*

163. *Id.*

164. 42 U.S.C. § 1320a-7a(a)(8).

165. Patient Protection and Affordable Care Act § 6402(d)(2)(A)(i).

166. *Id.* § 6408(a).

167. *Id.* § 6408(a)(2).

168. *Id.*

169. *Id.* § 6408(a)(3)(B).

170. OFFICE OF INSPECTOR GEN., FY 2010 OFFICE OF INSPECTOR GEN. WORK PLAN (2010), available at http://oig.hhs.gov/publications/docs/workplan/2010/Work_Plan_FY_2010.pdf.

(POA).¹⁷¹—The OIG will review Medicare claims to determine the number of inpatient hospital admissions for which certain diagnoses are coded as POA and the conditions that are most frequently coded as POA.¹⁷² The OIG will also determine which types of facilities are most frequently transferring patients with a POA diagnosis specified by CMS to hospitals and whether specific providers transferred a high number of patients to hospitals with POA diagnoses.¹⁷³

2. “*Payments for Services Ordered or Referred by Excluded Providers.*”¹⁷⁴—Entities or providers that are excluded from Medicare or Medicaid may not receive payment for items furnished, ordered, or prescribed by the excluded party.¹⁷⁵ Under the Work Plan, the OIG will review Medicare payments ordered or referred by excluded providers and will examine CMS’s oversight mechanisms for identifying improper payments.¹⁷⁶

3. “*Medicare Incentive Payments for E-Prescribing.*”¹⁷⁷—Under the Work Plan, the OIG “will review Medicare incentive payments made in 2010 to eligible health care professionals for their 2009 electronic prescribing (e-prescribing) activities.”¹⁷⁸ Physicians will be eligible for incentive payments beginning in 2010 if they are “successful electronic prescribers.”¹⁷⁹

4. “*Physician Reassignment of Benefits.*”¹⁸⁰—Unless an exception applies, physicians providing Medicare services may not reassign their right to payment to another entity.¹⁸¹ The OIG will review the extent to which Medicare physicians reassign their benefits to other entities and the extent to which physicians are aware of their reassignments.¹⁸²

III. LABOR AND EMPLOYMENT

A. Racial Preferences of Medical Facility Residents

In *Chaney v. Plainfield Healthcare Center*,¹⁸³ the United States Court of Appeals for the Seventh Circuit held that a nursing home’s policy of not allowing African-American certified nursing assistants (CNAs) to provide care to residents who had requested that they not be treated by African-American CNAs constituted a hostile work environment.

171. *Id.* at 6.

172. *Id.*

173. *Id.*

174. *Id.* at 18.

175. *Id.*

176. *Id.*

177. *Id.* at 14.

178. *Id.*

179. *Id.*

180. *Id.* at 17.

181. *Id.*

182. *Id.* at 18.

183. 612 F.3d 908 (7th Cir. 2010).

Brenda Chaney ("Chaney") was a CNA at Plainfield Healthcare Center ("Plainfield").¹⁸⁴ Plainfield had a policy of permitting residents to express their racial preferences and honoring those preferences in assigning health care providers.¹⁸⁵ The residents' racial preferences, if any, were listed on the assignment sheets of the CNAs, which were provided to the CNAs upon arriving at work. "In the case of Marjorie Latshaw, a resident in Chaney's unit, the [assignment] sheet instructed nurse aides that Latshaw 'Prefers No Black CNAs.'"¹⁸⁶ Plainfield acknowledged that the assignment sheet effectively banned Chaney, who was African-American, from assisting Latshaw.¹⁸⁷ "For fear of being fired, Chaney went along with the policy" and "refrained from assisting . . . [Latshaw], even when she was in the best position to respond."¹⁸⁸

Plainfield argued that its policy of honoring racial preferences of residents was necessary to avoid "violating state and federal laws that grant residents the rights to choose providers, to privacy, and to bodily autonomy."¹⁸⁹ Specifically, Plainfield stated that its policy was a reasonable and good faith effort to comply with title 410, section 16.2-3.1-3(n)(1) of the Indiana Administrative Code, which provides residents the right to "choose a personal attending physician and other providers of services."¹⁹⁰ The court, however, disagreed, finding that Plainfield was a racially hostile workplace because it "acted to foster and engender a racially-charged environment through its assignment sheet that unambiguously, and daily, reminded Chaney and her co-workers that certain residents preferred no black CNAs" and stating that the policy was unreasonable and unnecessary to comply with applicable laws.¹⁹¹

The court noted that Plainfield's reading of the Indiana regulation conflicted with Title VII, and "[w]hen two laws conflict, one state, one federal, the Supremacy Clause dictates that the federal law prevails."¹⁹² While acceding to a patient's preference regarding the gender of a health care provider can be legitimate under Title VII, it is never legitimate on the basis of race.¹⁹³ Further, "Indiana's regulations do not require Plainfield to instruct its employees to accede to the racial preferences of its residents"—they merely require Plainfield "to allow residents access to health-care providers of their choice."¹⁹⁴ That is, the

184. *Id.* at 910.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 913-14; *see also* 410 IND. ADMIN. CODE 16.2-3.1-3(n)(1) (2010) ("The resident has the right to . . . [c]hoose a personal attending physician and other providers of services.").

191. *Id.* at 912-13.

192. *Id.* at 914 (citing U.S. CONST. art. VI, cl. 2).

193. *See id.* at 913-14. The court cited *Rucker v. Higher Educational Aids Board*, 669 F.2d 1179 (7th Cir. 1982), to show that Title VII forbids employers from using race as a bona fide occupational qualification or a legitimate criterion for accommodating patients' privacy interests.

194. *Chaney*, 612 F.3d at 914.

regulations do not require Plainfield to accede to the racial preferences of residents with respect to its own employees. The court stated that

[i]f a racially-biased resident wishes to employ at her own expense a white aide, Indiana law may require Plainfield to allow the resident reasonable access to that aide. But the regulations do not say that a patient's preference for white aides that *Plainfield* employs trumps Plainfield's duty to its employees to abstain from race-based work assignments.¹⁹⁵

Next, Plainfield argued that its policy was legitimate under 42 U.S.C. § 1395i, "which provides that Medicare beneficiaries in long-term care facilities have a right to choose 'a personal attending physician.'"¹⁹⁶ The court rejected this argument, stating that "[t]he law is silent about a beneficiary's right to choose *other* service providers, such as CNAs."¹⁹⁷

Finally, Plainfield attempted to defend its policy by arguing that without the policy, Plainfield risked exposing black employees to racial harassment from the residents, thus "exposing itself to hostile workplace liability."¹⁹⁸ The court rejected this argument as well and offered several alternative ways that Plainfield could have confronted hostile residents. For instance, the court suggested "warn[ing] residents before admitting them of the facility's nondiscrimination policy, securing the resident's consent in writing."¹⁹⁹ In sum, the court held that Plainfield's policy created a racially-charged workplace in contravention of Title VII.

B. TRICARE and Affirmative Action Considerations

Another labor and employment case—this time in the affirmative action arena—that affects the health care industry both in Indiana and across the nation is *In re Office of Federal Contract Compliance Programs, United States Department of Labor v. Florida Hospital of Orlando*.²⁰⁰ There, an administrative law judge (ALJ) considered whether a not-for-profit hospital was a subcontractor to a government contractor and, as a result, was subject to federal affirmative action and nondiscrimination requirements.

TRICARE Management Activity (TMA) is a federal financial assistance

195. *Id.*

196. *Id.*

197. *Id.*; see also 42 U.S.C. § 1395i-3(c)(1)(A)(i) (2010) ("A skilled nursing facility must protect and promote the rights of each resident, including . . . the right to choose a personal attending physician . . .").

198. *Chaney*, 612 F.3d at 914.

199. *Id.* at 915. In addition, the court suggested attempting to reform residents' post-admission behavior, assigning staff "based on race-neutral criteria that minimize the risk of conflict", and advising Plainfield employees "that they could ask for protection from racially harassing residents." *Id.*

200. Fla. Hosp. of Orlando, U.S. Dep't of Labor, No. 2009-OFC-00002 (Oct. 18, 2010).

program that administers health care for active duty and retired military and their families under the TRICARE program.²⁰¹ To assist with the administration of the program, TMA contracts with managed care support contractors, who are responsible for “enrollment, referral management, medical management, claims processing and customer service,” as well as “[underwriting] healthcare costs and establish[ing] networks of providers who agree to follow rules and procedures of the TRICARE program when treating TRICARE patients.”²⁰² Beginning in August 2003, Humana Military Healthcare Services, Inc. (HMHS) contracted with TMA “to provide networks of health care providers” to TRICARE beneficiaries.²⁰³ The TMA-HMHS contract provided that “HMHS shall provide a managed, stable high-quality network or networks of individual and institutional health care providers” and must “establish provider networks through contractual arrangements.”²⁰⁴

The defendant in this case, Florida Hospital of Orlando, is an acute care, not-for-profit hospital with more than fifty employees located in Orlando, Florida.²⁰⁵ This hospital had a hospital agreement with HMHS since April 2005, pursuant to which the hospital agreed to become a participating hospital and “provide health care services for beneficiaries designated as eligible to receive benefits under the agreement between HMHS and TRICARE in accordance with the TRICARE rules, regulations, policies and procedures.”²⁰⁶ Under the TMA-HMHS contract, HMHS paid the hospital \$100,000 or more annually for medical services provided to TRICARE beneficiaries from January 1, 2006 onward.

On August 14, 2007, the Office of Federal Contract Compliance Programs (OFCCP) initiated compliance reviews of the hospital and requested documentation to show that the hospital was complying with the affirmative action and equal employment opportunity obligations set forth in Executive Order 11,246.²⁰⁷

The hospital refused to provide any information requested by OFCCP and argued that the OFCCP lacked jurisdiction over the hospital. Because Executive Order 11,246 applies only to government contractors and subcontractors, the hospital raised two arguments in support of its position that it is not a covered

201. *Id.* at 2.

202. *Id.*

203. *Id.*

204. *Id.* (internal citation omitted).

205. *Id.*

206. *Id.*

207. *Id.* at 3; *see also* Exec. Order No. 11,246, 3 C.F.R. § 339 (1964-65), *as amended by* Exec. Order No. 11,375, 3 C.F.R. § 684 (1966-70); Exec. Order No. 12,086, 3 C.F.R. § 230. Specifically, the Executive Orders, as codified at 41 C.F.R. §§ 601.3, 60-250.2, and 741.2, require that any government contractors or subcontractors must establish written affirmative action employment programs (AAPs). OFCCP sought information about the hospital’s AAPs and requested “(1) a copy of Defendant’s Executive Order . . . [AAP]; (2) a copy of Defendant’s § 503 (38 U.S.C. § 4212) AAP(s) prepared according to 41 CFR parts 60-741 and 60-250; and (3) support data specified in an enclosed itemized listing.” *Fla. Hosp. of Orlando*, No. No. 2009-OFC-00002, at 3.

subcontractor under the statutes.²⁰⁸ First, the hospital argued that it was not a “covered contractor” because it did not enter into a subcontract as defined in 41 C.F.R. §§ 60-1.3, 60-250.2, and 741.2. Under the regulations, a “subcontract” is defined as:

[a]ny agreement or arrangement between a contractor and any person . . . (1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or (2) Under which any portion of the contractor’s obligation under any one or more contracts is performed, undertaken or assumed.²⁰⁹

But the ALJ, relying on *OFCCP v. UPMC Braddock*,²¹⁰ found that the hospital did perform a portion of the contractor’s obligation under its contract with TRICARE. Specifically, the ALJ stated that under the hospital agreement, the hospital contracted “to provide medical services to TRICARE’s beneficiaries under the agreement between HMHS and . . . [TMA].”²¹¹ Therefore, the hospital was a subcontractor under HMHS’s contract with TRICARE because it performed “‘a portion of the contractor’s obligations’ by providing some of the medical services to TRICARE’s beneficiaries which HMHS has contracted to provide.”²¹²

The second argument raised by the hospital was that its participation in the TRICARE program constituted the receipt of federal financial assistance, and OFCCP did not have jurisdiction over businesses that receive federal financial assistance. In 1993, OFCCP issued a statement that “OFCCP lacks jurisdiction over businesses if their only relationship with the federal government is as a recipient of federal financial assistance, be it from Medicare or other federal programs.”²¹³ As a result, the hospital argued that TRICARE is “essentially indistinguishable” from Medicare, and thus, receipt of federal funding under this program did not constitute a subcontractor relationship.

In response to the hospital’s second argument, the ALJ again disagreed and found that Medicare and TRICARE are substantially different; while “Medicare does not provide medical services to its beneficiaries . . . TRICARE is the uniformed services health care program for active duty service members and their families. . . . That Medicare may be considered federal financial assistance has no relevance to TRICARE. They are totally different programs.”²¹⁴ Ultimately,

208. *Id.* at 4.

209. *Id.*

210. *UPMC Braddock*, No. 08-048 (May 29, 2009) (holding that defendant hospitals were subcontractors to a government contract where the hospital contracted with an HMO to provide services to federal employees pursuant to an agreement between the HMO and the Office of Personnel Management).

211. *Fla. Hosp. of Orlando*, No. 2009-OFC-00002, at 4.

212. *Id.* at 4-5.

213. *Id.* at 5.

214. *Id.* at 5-6 (internal citation omitted). Note that this holding is contrary to the Department

the hospital was ordered to give OFCCP access to its facilities and otherwise permit OFCCP to conduct and complete its compliance audit. The hospital has appealed the ALJ's opinion to the Administrative Review Board.

In light of the *OFCCP* decision, and subject to the outcome of the hospital's appeal to the administrative review board, the number of health care providers that are now subject to affirmative action requirements appears to have been dramatically increased.

C. Amendments to the Fair Labor Standards Act of 1938 in Light of the Patient Protection and Affordable Care Act

While the majority of the provisions in the PPACA are aimed at improving health care access and quality and reducing cost, the PPACA also made amendments to the Fair Labor Standards Act of 1938 (FLSA).²¹⁵ The four amendments concern automatic enrollment of employees for health care benefits with an "opt-out" mechanism,²¹⁶ a requirement that employers inform employees of insurance exchanges,²¹⁷ anti-retaliation and whistleblower protection,²¹⁸ and lactation accommodations for nursing mothers.²¹⁹ With the exception of the provision concerning notice of insurance exchanges (which becomes effective March 1, 2013), none of these provisions have express effective dates and presumably require employers to comply immediately.

PPACA § 1511 adds § 218a to the FLSA.²²⁰ Under this section, an employer with more than 200 full-time employees that offers one or more health benefit plans must automatically enroll newly hired full-time employees in one of the plans offered. However, the employer must provide adequate notice of the enrollment as well as an opportunity for the employee to opt out of the coverage in which he or she was automatically enrolled.²²¹

PPACA § 1512 adds § 218b to the FLSA,²²² which requires an employer to provide written notice of the existence of an insurance exchange to newly hired employees and all current employees.²²³ As stated above, this provision is not

of Defense's position—the ALJ noted that "TRICARE's position . . . is that 'it would be impossible to achieve the TRICARE mission of providing affordable health care for our nation's active duty and retired military members and their families if onerous federal contracting rules were applied to the more than 500,000 TRICARE providers in the United States' and that 'it was never the agency's intent to do so.'" *Id.* at 3 (internal citation omitted).

215. Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (2006).

216. Pub. L. No. 111-148, tit. I, § 1511, 124 Stat. 252 (2010) (amending 29 U.S.C. § 218a).

217. *Id.* § 1512 (amending 29 U.S.C. § 218b).

218. *Id.* § 1558 (amending 29 U.S.C. § 218c).

219. Pub. L. No. 111-148, tit. IV, § 4207, 124 Stat. 577 (2010) (amending 29 U.S.C. § 207(r)(1)(A)).

220. *Id.* § 1511.

221. *Id.*

222. *Id.* § 1512.

223. *Id.*

effective until March 1, 2013.²²⁴

PPACA § 1558, which adds § 218c to the FLSA,²²⁵ prohibits employer discrimination or retaliation against any employee who has received a tax credit or subsidy for a health plan.²²⁶ The employer is also prohibited from discriminating or retaliating against an employee who has provided (or is about to provide) the federal government or state attorney general information concerning the employer's action or inaction that the employee reasonably believes to be a violation of the PPACA.²²⁷ An employee who believes that he or she has been discriminated or retaliated against in violation of this section may seek relief using the procedures outlined in 15 U.S.C. §2087(b).²²⁸

Finally, PPACA § 4207 adds § 207(r)(1)-(4) to the FLSA.²²⁹ Under this provision, an employer must provide "reasonable break time . . . [to allow a mother] to express breast milk for her nursing child" as often as the mother needs to do so for one year after the child's birth.²³⁰ However, the employer is not required to compensate the employee during this time.²³¹ The employer must provide the employee with "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public" in which to express breast milk.²³² An employer with fewer than fifty employees is not subject to these requirements if the requirements cause undue hardship by imposing significant difficulty or expense in relation to the employer's "size, financial resources, nature, or structure of the employer's business."²³³ This section does not preempt state law that provides greater protection for employees²³⁴ (such as requiring compensation during breaks or requiring breaks past the child's first birthday).

D. Immigration: Impact of Neufeld Memorandum on Physicians

The H-1B program is one of the avenues for non-U.S. citizens coming to the United States to obtain temporary work authorization. The H-1B regulations specifically authorize the use of this program by physicians.²³⁵ H-1B work authorization is employer-specific. To constitute an "employer" for purposes of the H-1B program, a petitioner must establish that a valid employer-employee relationship exists between the U.S. employer and prospective H-1B

224. *Id.*

225. *Id.* § 1558.

226. *Id.*

227. *Id.*

228. *Id.*; see also 15 U.S.C. § 2087(b) (addressing whistleblower protections).

229. Pub. L. No. 111-148, tit. IV, § 4207, 124 Stat. 577 (2010) (adding 29 U.S.C. § 207(r)).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. 8 C.F.R. § 214.2(h)(4)(viii)(2010).

beneficiary.²³⁶ In the past, United States Citizenship and Immigration Services (USCIS) examined the employer-employee relationship under the “conventional master-servant relationship as understood by the common-law agency doctrine.”²³⁷

Despite the previously relied upon common law principles of agency, on January 8, 2010, USCIS released a memorandum stating that there is a lack of formal guidance for determining whether the required employer-employee relationship exists between the petitioner and H-1B beneficiary.²³⁸ This lack of guidance causes problems, particularly for certain types of H-1B petitions, such as where the H-1B beneficiary is placed at a third-party worksite.²³⁹ According to the memorandum, while some third-party worksite arrangements are based on valid employer-employee relationships, other relationships do not meet this baseline test.²⁴⁰ To create additional guidance, the memorandum delineated the following eleven factors to be considered in evaluating whether a valid employer-employee relationship exists:

- (1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
- (2) If the supervision is off-site, how does the petitioner maintain such supervision, *i.e.* weekly calls, reporting back to main office routinely, or site visits by the petitioner?
- (3) Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?
- (4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
- (5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?
- (6) Does the petitioner evaluate the work-product of the beneficiary, *i.e.* progress/performance reviews?
- (7) Does the petitioner claim the beneficiary for tax purposes?
- (8) Does the petitioner provide the beneficiary any type of employment benefits?
- (9) Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?

236. *Id.* § 214.2(h)(4)(ii)(4) (defining employer as “a person, firm, corporation, contractor, or other association or organization in the United States which . . . [e]ngages a person to work within the United States; [h]as an employer-employee relationship with respect to employees”; and has an Internal Revenue Service tax identification number).

237. See Memorandum from Donald Neufeld, Associate Director of Service Center Organizations, to Service Center Directors of U.S. Citizen & Immigration Services 3 (Jan. 8, 2010), available at <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf> (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992)).

238. *Id.* at 2.

239. *Id.* at 2.

240. *Id.*

(10) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?

(11) Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?²⁴¹

The employer will meet the relationship test if it is able to establish its right to control the H-1B beneficiary, as determined by the totality of circumstances.²⁴²

Contrary to the intent of the memorandum, this eleven-factor test creates a potential conflict where the H-1B beneficiary provides services at a third-party worksite. Physicians fall into this potential conflict arena, as they are often employed by one entity and provide services at a third-party hospital or medical clinic. In these situations, the H-1B process is significantly more document-intensive. To establish a valid employer-employee relationship under the eleven-factor test, the petitioner must submit evidence of the right to control the H-1B beneficiary's work, "including the ability to hire, fire, and supervise the beneficiary", and evidence that the employer maintains responsibility "for the overall direction of the beneficiary's work."²⁴³ This is complicated in the physician setting, where physicians are employed by one entity but perform their duties at a third-party medical facility.

The memorandum lists several types of evidence which may help establish the employer-employee relationship, including a signed employment agreement, position description, contracts between the petitioner and third-party worksite which evidence the petitioner's right to control the H-1B beneficiary, and a copy of the organizational chart, demonstrating the H-1B beneficiary's supervisory chain, among other items.²⁴⁴ Because each H-1B petition involving a physician and third-party worksite is evaluated on a case-by-case basis, no specific combination of evidence will suffice for every petition.

Where the petitioner is unable to establish the right to control the H-1B beneficiary, per the eleven factors outlined in the memorandum, USCIS may issue a request for evidence (RFE)²⁴⁵ in connection with the petition, or the petition may be denied for failure to satisfy these requirements.²⁴⁶

IV. TAX

A. New Requirements for Tax-Exempt Hospitals

The landscape for hospital organizations in Indiana and across the country that are exempt from tax under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), changed significantly with the enactment of the PPACA. Section 9007 of the PPACA adds Section 501(r) to the Code, which

241. *Id.* at 3-4.

242. *Id.* at 4.

243. *Id.* at 8 (citing 8 C.F.R. § 214.2(h)(4)(ii)).

244. *Id.* at 8-9.

245. *Id.* at 10.

246. *Id.* at 8.

contains four new requirements that hospital organizations must satisfy in order to attain or maintain their tax-exempt status. Hospital organizations subject to Code Section 501(r) are now required to do the following: adopt a written financial assistance policy; limit charges for emergency or other necessary care; refrain from engaging in extraordinary collection efforts; and conduct a community health needs assessment once every three years.²⁴⁷ Except for the community health needs assessment requirement, these provisions apply for tax years beginning after the date of enactment of the PPACA (March 23, 2010).

B. Applicability of Code Section 501(r) and Definition of Hospital

The requirements of Code Section 501(r) apply to any organization exempt from tax under Code Section 501(c)(3) that operates a facility which is required by a state to be licensed, registered or similarly recognized as a hospital, or otherwise has hospital care as its principal function or purpose constituting the basis for its exemption under Code Section 501(c)(3). The PPACA does not address or define what “similarly recognized” means, nor does it address what constitutes “hospital care” for purposes of these new requirements. Notably, under Code Section 501(r)(2)(B), if a hospital organization operates more than one hospital facility, then each separate facility must meet the new requirements.²⁴⁸

C. New Requirements

1. Financial Assistance Policy.—Hospital organizations must have a written financial policy in place that establishes:

- (i) eligibility criteria for financial assistance, and whether such assistance includes free or discounted care;
- (ii) the basis for calculating amounts charged to patients;
- (iii) the method for applying for financial assistance;
- (iv) in the case of an organization which does not have a separate billing and collections policy, the actions the organization may take in the event of non-payment, including collections action and reporting to credit agencies; and
- (v) measures to widely publicize the policy within the community to be served by the organization.²⁴⁹

In addition, hospital organizations must have a written policy requiring the organization to provide care for emergency medical conditions to individuals regardless of their eligibility under the aforementioned financial assistance policy.

2. Limitation on Charges.—Hospital organizations must limit the amount

247. Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 9007, 124 Stat. 119 (2010).

248. I.R.C. § 502(r)(2)(B) (West, Westlaw through 2011 legislation).

249. *Id.* § 501(r)(4).

they charge for emergency or other medically necessary care to those individuals who are eligible for assistance under a financial assistance policy to “not more than the amounts generally billed to individuals who have insurance covering such care.”²⁵⁰

3. *Billing and Collections*.—Hospital organizations may not engage in “extraordinary” collections efforts unless they have made “reasonable efforts” to determine whether an individual is eligible for their financial assistance policy.²⁵¹

4. *Community Health Needs Assessment*.—Within three taxable years following the PPACA’s date of enactment and no less than every three years thereafter, hospital organizations must conduct a community health needs assessment.²⁵² This assessment must take into account input from persons with a broad range of interests in the communities they serve and include individuals with expertise in public health. The assessments must be made widely available to the public, and hospital organizations must adopt an implementation strategy to address the community health needs identified in the assessments.²⁵³ Failure to comply with this requirement can result in a \$50,000 excise tax to the hospital organization.

Hospital organizations will also be required to file in each taxable year a description of how they are addressing community health needs identified in the assessment, any identified needs not being addressed and the reasons why they are not being addressed, and audited financial statements. This description and the audited financial statements will be reported as part of the organization’s Form 990.²⁵⁴ The PPACA further mandates that the Internal Revenue Service (IRS) review the community benefit activities of each hospital organization at least once every three years.²⁵⁵

D. Impact on Indiana Hospital Organizations

Hospital organizations in Indiana may have a head start on compliance with some of the PPACA’s new requirements. Specifically, the community health needs assessment requirement under the PPACA is similar to a requirement under Indiana law for Indiana nonprofit hospitals to develop and report on a community benefits plan. Indiana law requires nonprofit hospitals²⁵⁶ to develop

250. *Id.* § 501(r)(5).

251. *Id.* § 501(r)(6).

252. *Id.* § 501(r)(3).

253. *Id.* § 501(r)(3)(B).

254. Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 9007, 124 Stat. 119 (2010).

255. *Id.*

256. The Indiana Code defines a “nonprofit hospital” as “a hospital that is organized as a nonprofit corporation or a charitable trust under Indiana law or the laws of any other state or country and that is: (1) eligible for tax exempt bond financing; or (2) exempt from state or local taxes.” IND. CODE § 16-21-9-3 (2011).

a community benefits plan that these hospitals will use to address the health care needs of the communities they serve.²⁵⁷ When developing this community benefits plan, nonprofit hospitals must consider the health care needs of the communities they serve “as determined by communitywide needs assessments.”²⁵⁸ The community benefits plan must consist of “(1) [m]echanisms to evaluate the plan’s effectiveness, including a method for soliciting the views of the communities served by the hospital[;] (2) measurable objectives to be achieved within a specified time frame[; and] (3) a budget for the plan.”²⁵⁹ Finally, nonprofit hospitals must file an annual report of the community benefits plan with the Indiana State Department of Health and make the report widely available to the public by posting it in prominent places, including the emergency room waiting area and the admissions office waiting area.²⁶⁰

When one compares the requirements of Code Section 501(r)(3) regarding a community health needs assessment to the Indiana state law requirements regarding a community benefits plan, several similarities can be found. The Indiana Code provisions require, as part of the community benefits plan, that nonprofit hospitals conduct communitywide needs assessments, and these communitywide assessments may be similar to what is ultimately required in a community health needs assessment under Code Section 501(r)(3). Further, the Indiana Code requires that the community benefit report, which may include the communitywide assessments, be made widely available to the public, which is similar to the new requirements in Code Section 501(r)(3). Lastly, the Indiana Code requires that nonprofit hospitals file an annual community benefit report, which, depending on further guidance from the Treasury and the IRS, may be similar to the reporting requirements of Code Section 501(r)(3). In sum, the existing Indiana Code requirements, while not identical, are similar to the new requirements of Code Section 501(r)(3) and may make it easier for Indiana hospital organizations to comply with the new requirements under the PPACA for community health needs assessments.

Meanwhile, the applicability of Code Section 501(r) to some Indiana county and community hospitals remains unclear. While Code Section 501(r) will require hospitals exempt from taxation under Section 501(c)(3) of the Code to comply with the new requirements of Code Section 501(r), it does not address whether hospitals exempt from taxation under another section of the Code, including many Indiana county or community hospitals, have the same responsibility.²⁶¹ These hospitals are exempt from taxation under Code Section 115 or via Treasury Regulation Section 1.103-1(b). However, they may have sought and received rulings that they also qualify as exempt organizations under Code Section 501(c)(3) in order to offer certain employee benefit plans. Given that these hospitals do not derive their exempt status from Section 501(c)(3), it

257. *Id.* § 16-21-9-4.

258. *Id.* § 16-21-9-5.

259. *Id.* § 16-21-9-6.

260. *Id.* § 16-21-9-7.

261. See generally I.R.C. § 502(r) (West, Westlaw through 2011 legislation).

is unclear whether such hospitals will be subject to the requirements and penalties contained in Code Section 501(r). Additional guidance regarding this aspect of the law will provide welcome clarity for these particular organizations.

E. Guidance on the Horizon

Hospital organizations can expect that the IRS and the Department of the Treasury will issue proposed Treasury Regulations that provide clarification on a number of issues, as evidenced by the issuance of Notice 2010-39 (the “Notice”) in May of this year to solicit comments regarding the application various aspects of the new requirements on Hospital Organizations.²⁶² The Notice specifically requested comments by July 22, 2010, regarding: (1) the appropriate requirements for a community health needs assessment;²⁶³ (2) what constitutes “reasonable efforts” in determining eligibility for assistance under a hospital’s financial assistance policy (for purposes of the new billing and collection rule);²⁶⁴ (3) where a hospital organization operates more than one hospital facility, the consequences of that organization’s failure to comply with the new rules with respect to some, but not all, of its hospital facilities;²⁶⁵ and (4) input for particular areas in need of additional guidance.

With the close of the public comment period in July of 2010, initial guidance from the IRS and the Department of the Treasury should be produced in the coming months.

F. Next Steps

Until guidance is released by the IRS and the Department of the Treasury, hospital organizations need to be evaluating whether their current policies address the basic components of the new requirements. Particular attention should be paid to the requirements for financial assistance policies, limitations on charges, and billing and collections practices because they are effective for tax years starting after the date of enactment of the PPACA (March 23, 2010). Hospital organizations should also begin considering who will perform community health needs assessments and how they will be performed—these are optional now and will become mandatory for tax years beginning after March 23, 2012.

V. HEALTH INFORMATION TECHNOLOGY

When implemented properly and widely adopted, health information technology (HIT) is accepted as a means to increase health care system

262. INTERNAL REVENUE SERV., NOTICE 2010-39: REQUEST FOR COMMENTS REGARDING ADDITIONAL REQUIREMENTS FOR TAX-EXEMPT HOSPITALS (2010), *available at* <http://www.irs.gov/pub/irs-drop/n-10-39.pdf>.

263. *Id.* at 1-2.

264. *Id.* at 3.

265. *Id.* at 4.

efficiency, improve patient care and quality, and bend the cost curve.²⁶⁶ HIT allows health care professionals to manage patient care through integrated data sources like electronic health records (EHRs), decision support systems, and physician order entry at multiple practice sites through synchronized state and national health information exchanges.²⁶⁷ The development and implementation of HIT continues to expand due in large part to the financial incentives unveiled in this past year's statutory and regulatory developments at the federal level.²⁶⁸ The following presents a brief survey of key HIT developments affecting Indiana health professionals from October of 2009 to September of 2010.

A. Federal HIT Statutory & Regulatory Development

Since October of 2009, both the federal legislature and administrative agencies' actions continued to stimulate HIT implementation at the local, regional, and national level. The promulgation of regulations for the Medicare and Medicaid Electronic Health Record Incentive Programs ("EHR Incentive

266. *Health Information Technology: Can HIT Lower Costs and Improve Quality?*, RAND CORP. (2005), http://www.rand.org/pubs/research_briefs/RB9136/index1.html ("If all hospitals had a HIT system including Computerized Physician Order Entry, around 200,000 adverse drug events could be eliminated each year, at an annual savings of about \$1 billion. Most of the savings would be generated by hospitals with more than 100 beds.") (internal citation omitted). *But see* Spencer S. Jones et al. *Electronic Health Record Adoption and Quality Improvement in US Hospitals*, 16 AM. J. MANAGED CARE 64 (2010), available at http://www.ajmc.com/supplement/managed-care/2010/AJMC_10dec_HIT/AJMC_10decHIT_Jones_SP64to71 ("Mixed results suggest that current practices for implementation and use of EHRs have had a limited effect on quality improvement in US hospitals. However, potential 'ceiling effects' limit the ability of existing measures to assess the effects that EHRs have had on hospital quality. In addition to the development of standard criteria for EHR functionality and use, standard measures of the effect of EHRs are needed.").

267. Health information exchanges are organizations that connect health care providers and enable medical information to follow a patient regardless of the treatment location. In Indiana, the Indiana Health Information Exchange, a nonprofit organization, is one of the largest health information exchanges in the United States—with a network of almost seventy hospitals and 19,000 physicians serving over twelve million patients with approximately 2.5 million pieces of data added daily. IND. HEALTH INFO. EXCHANGE, OVERVIEW, available at <http://www.ihie.org/pdfs/IHIE-Overview.pdf> (last visited Aug. 6, 2011); RAND CORP., *supra* note 266.

268. Richard Hillestad et al., *Can Electronic Medical Record Systems Transform Health Care? Potential Health Benefits, Savings, and Costs*, 24.5 HEALTH AFFAIRS 1003, 1004 (2005) (discussing benefits and barriers to EHR implementation); *see generally* David Blumenthal & Marilyn Tavenner, *The "Meaningful Use" Regulation for Electronic Health Records*, 363:6 NEW ENG. J. MED. 501-04 (2010) (discussing the EHR Incentive Program); *see also* *Interest-Free Loans Available to Help Physicians Adopt Electronic Health Records*, UNITED HEALTH GROUP (Jan. 11, 2010), <http://www.unitedhealthgroup.com/newsroom/news.aspx?id=219ef4ce-ac1e-4dea-8e6d-aa5c76614a92> (discussing newly available interest-free financing to health care providers to purchase select EHR technology).

Program”) and the comprehensive reform efforts of the PPACA were the prominent catalysts behind HIT advancement and expansion.

B. EHR Incentive Program

The EHR Incentive Program was established in February of 2009 under the American Recovery and Reinvestment Act of 2009 and the Health Information and Technology Act (HITECH).²⁶⁹ This past year, under HITECH’s statutory authority, both the federal Department of Health and Human Services (HHS) and the Office of the National Coordinator for Health Information Technology (ONC) released administrative regulations detailing the EHR Incentive Program.²⁷⁰

In June 2010, ONC issued final rules, standards, and implementation measures for a temporary certification program for EHR Incentive Program technology.²⁷¹ Health professionals must use certified EHR technology to receive the incentive payments.²⁷² In July 2010, HHS released the final rules implementing the EHR Incentive Program, which provide incentive payments totaling up to twenty-seven billion over the next ten years for eligible professionals, eligible hospitals, and critical access hospitals participating in the Medicare and Medicaid programs that adopt, implement, and successfully demonstrate “meaningful use” of certified EHR technology.²⁷³ Successful “meaningful use” requires showing that certified EHR technology can be measured in both quantity and quality by fulfilling two sets of objective measures: the core set and the menu set.²⁷⁴ The core set consists of basic measurements such as patient’s vital signs, demographic information, and active medications.²⁷⁵ The menu set offers professionals the option to choose from a list of applicable tasks such as drug formulary checks or recording advance directives for patients sixty-five years of age or older.²⁷⁶ Practitioners can expect HHS to expand and require additional measures in 2013 and 2015 for both sets in order

269. Health Information Technology for Economic and Clinical Health Act, Pub. L. No. 111-5, 123 Stat. 115 (2009).

270. *Registration for the Medicare and Medicaid EHR Incentive Program Is Now Open*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/EHRIncentivePrograms/20_RegistrationandAttestation.asp (last modified July 29, 2011).

271. Establishment of the Temporary Certification Program for Health Information Technology, 75 Fed. Reg. 36,158 (June 24, 2010) (to be codified at 42 C.F.R. pt. 170).

272. *Id.* at 36,160.

273. Medicare and Medicaid Programs; Electronic Health Record Incentive Program, 75 Fed. Reg. 44,314 (July 28, 2010) (to be codified at 42 C.F.R. pts. 412, 413, 422, and 495).

274. *CMS EHR Meaningful Use Overview*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/EHRIncentivePrograms/30_Meaningful_Use.asp (last modified Apr. 20, 2011) (discussing meaningful use requirements).

275. Blumenthal & Tavenner, *supra* note 268, at 502.

276. *Id.* at 503.

to continuously improve quality care metrics.²⁷⁷

C. Patient Protection and Affordable Care Act of 2010

The passage of the PPACA in March of 2010 further encouraged the deployment and adaptation of HIT by healthcare professionals.²⁷⁸ The PPACA's impact on and advancement of HIT is threefold: (1) quality of health care; (2) operating rules and standards; and (3) HIT availability and workforce.²⁷⁹ Professionals can expect administrative regulations to expand upon these areas in the coming years.

1. *Quality of Health Care.*—The PPACA emphasizes HIT as a principal component to improve the quality of reporting, accuracy, and efficiency of data collection and management.²⁸⁰ Under the PPACA, HHS and ONC will develop national standards for data collection, interoperability, and security measures for data management systems.²⁸¹ The PPACA will also require collection and public reporting of certain performance information summarizing data on quality measures that are in turn aligned with the HIT expansion and interoperability efforts like the EHR Incentive Program.²⁸² In addition, professionals and entities who receive technical assistance grants under PPACA § 934 (quality improvement technical assistance and implementation) to demonstrate the capability to provide information and technical assistance to healthcare providers are required to coordinate with HIT regional extension centers regarding quality improvement and system delivery reform.²⁸³

2. *Operating Rules and Standards.*—PPACA § 1561 requires HHS and the HIT policy and standards committees to develop interoperable and secure standards for enrolling individuals in federal and state health and human service programs.²⁸⁴ Also, Section 1104 requires establishing a single set of operating

277. *See id.* at 504. Meaningful use measurements and criteria will be implemented in three stages, with each stage adding additional requirements. Currently, Stage 1 is set for 2011-12, Stage 2 will be implemented in 2013, and Stage 3 in 2015. *CMS EHR Meaningful Use Overview*, *supra* note 274.

278. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); *see also* HEALTHCARE INFO. & MGMT. SYS. SOC'Y, THE PATIENT PROTECTION AND AFFORDABLE CARE ACT: SUMMARY OF KEY HEALTH INFORMATION TECHNOLOGY PROVISIONS (2010), *available at* http://www.himss.org/content/files/PPACA_Summary.pdf (providing a more detailed discussion of HIT utilization under the PPACA).

279. *Id.* at 1.

280. *Id.*

281. Patient Protection and Affordable Care Act § 4302(a)(3).

282. *Id.* §§ 399JJ, 10305.

283. *Id.* § 934.

284. The Health IT Standards Committee is responsible for making recommendations to the National Coordinator for HIT Standards. *Health IT Standards Committee (a Federal Advisory Committee)*, OFFICE OF THE NAT'L COORDINATOR FOR HEALTH INFO. TECH., <http://healthit.hhs.gov/portal/server.pt?open=512&objID=1271&parentname=CommunityPage&parentid=6&mode=2> (last

rules to simplify health care administration for actions such as electronic funds transfers, healthcare payments, health claims, and referral authorization.²⁸⁵

3. *HIT Availability & Workforce*.—Similar to HITECH, the PPACA makes available grants for qualifying long-term care facilities to acquire certified EHR technology.²⁸⁶ In addition, HHS is seeking to improve HIT availability under the authority of PPACA § 6114, which authorizes a demonstration project to develop best practices in skilled nursing facilities for the use of HIT to improve resident care.²⁸⁷ As HIT becomes more available, the health care workforce will face new tasks and potentially new employment duties requiring the use of HIT. For example, the PPACA authorized under § 3502 the creation of community-based “health teams” comprised of health care professionals from multiple disciplines and expertise who can competently use HIT in delivery patient care.²⁸⁸

D. Indiana State HIT Developments

This past year, the State of Indiana began to take steps towards implementing federally initiated HIT programs. As required by HITECH in order to be eligible to receive grant awards, Indiana selected Indiana Health Information Technology, Inc as the qualified state-designated entity.²⁸⁹ In March of 2010, ONC announced that Indiana Health Information Technology, Inc. received a \$10,300,000 grant under the HITECH State Health Information Exchange Cooperative Agreement Program (SHIECAP). SHIECAP is designed to further advance both state and regional health information exchanges while continuing to work towards unified nationwide interoperability.²⁹⁰ Also, in 2010, HHS awarded \$16,008,431 to the Indiana Health Information Exchange as one of seventeen HIT Beacon Communities under HITECH.²⁹¹ In addition, the Indiana Medicaid office is in

modified June 30, 2011). The Health Policy Committee is responsible for making recommendations to the National Coordinator for HIT Standards on issues of policy. *Health IT Policy Committee (a Federal Advisory Committee)*, OFFICE OF THE NAT’L COORDINATOR FOR HEALTH INFO. TECH., <http://healthit.hhs.gov/portal/server.pt?open=512&objID=1269&parentname=CommunityPage&parentid=5&mode=2> (last modified July 23, 2011).

285. Patient Protection and Affordable Care Act § 1104.

286. *Id.* § 2041.

287. *Id.* § 6114.

288. *Id.* § 3502.

289. *See id.* § 2041.

290. *State Health Information Exchange Cooperative Agreement Program*, OFFICE OF THE NAT’L COORDINATOR FOR HEALTH INFO. TECH., <http://healthit.hhs.gov/portal/server.pt?open=512&objID=1336&mode=2&cached=true> (last modified Jan. 19, 2011).

291. The HITECH Beacon Communities primarily “focus on specific and measurable improvement goals in the three vital areas for health systems improvement in the Beacon Community”—quality, cost efficiency, and population health—to demonstrate HIT’s function in transforming the local health care systems. *Beacon Community Program: Improving Health Through Health Information Technology*, OFFICE OF THE NAT’L COORDINATOR FOR HEALTH INFO. TECH., http://healthit.hhs.gov/portal/server.pt/community/healthit_hhs_gov__onc_

the planning phases of readiness for the EHR Incentive Program.²⁹²

E. 2011 Developments and Beyond

From October 2009 to September 2010, as a result of federal efforts (but also key operations at the state and local level), Indiana took significant steps towards making HIT a more central component for health professionals' daily patient care. In the near future, health professionals can expect HIT implementation to continue to expand with additional federal administrative regulations for both the EHR Incentive Program and PPACA programs. As this trend continues, Indiana health professionals can expect increased legislative, administrative, and possible judicial action in regard to HIT both locally and nationally.

VI. HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA) AND PRIVACY UPDATES

A. HITECH

Recently, significant developments have occurred within the area of HIPAA enforcement. On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (the "Recovery Act").²⁹³ Title XIII of the Recovery Act is known as the Health Information Technology for Economic and Clinical Health Act (HITECH). Among other provisions, HITECH makes several changes to the administrative simplification provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA)—more specifically, the privacy and security rules.²⁹⁴ These changes include: extending the applicability of certain of the privacy and security rules' requirements to the business associates of covered entities; requiring HIPAA-covered entities and business associates to provide for notification of breaches of protected health information (PHI) that is unsecured; establishing new

beacon_community_program__improving_health_through_health_it/1805 (last modified May 19, 2011).

292. *Indiana Electronic Health Records (EHR) Incentive Program*, INDIANA MEDICAID FOR PROVIDERS, <http://provider.indianamedicaid.com/general-provider-services/ehr-incentive-program.aspx> (last visited Aug. 6, 2011).

293. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

294. The administrative simplification provisions of HIPAA provided for the establishment of national standards for the electronic transmission of certain health information, such as standards for certain health care transactions conducted electronically and code sets and unique health care identifiers for health care providers and employers. These provisions also required the establishment of national standards to protect the privacy and security of personal health information and established civil money and criminal penalties for violations. The provisions apply to three types of entities known as "covered entities": health care providers who conduct covered health care transactions electronically, health plans, and health care clearinghouses. *HIPAA Administrative Simplification Statute and Rules*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/ocr/privacy/hipaa/administrative/index.html> (last visited Aug. 6, 2011).

limitations on the use and disclosure of PHI for marketing and fundraising purposes; prohibiting the sale of PHI; requiring the consideration of a limited data set as the minimum necessary amount of information; and expanding individuals' rights to access and receive an accounting of disclosures of their PHI, and to obtain restrictions on certain disclosures of PHI to health plans.²⁹⁵ In addition, HITECH adopts provisions designed to strengthen and expand HIPAA's enforcement provisions.

Certain HITECH provisions have already been the subject of rulemakings and related actions, as published by HHS as interim final regulations.

1. Breach Notification.—On August 24, 2009, HHS published interim final regulations to implement the breach notification provisions of HITECH.²⁹⁶ This interim final regulation was effective September 23, 2009.

In general, the interim final rule requires covered entities to notify affected individuals and HHS in the event of a breach²⁹⁷ of unsecured PHI²⁹⁸ that compromises the security or privacy of the PHI, unless an exception applies. Accordingly, in order to determine if notice is required under this interim final rule, a covered entity must make the following three determinations: (1) whether a breach of PHI occurred; (2) whether the PHI was unsecured; and (3) whether an exception applies.²⁹⁹ The interim final rule clarified and reasserted the three exceptions contained in HITECH. Those exceptions are as follows:

- (1) Unintentional acquisition, access, or use of PHI by a workforce member acting under the authority of a covered entity or business associate, if done in good faith and the information was not further used or disclosed;
- (2) Inadvertent disclosure of PHI by a person authorized to access PHI at a covered entity or business associate to another person authorized to access PHI at the same covered entity, business associate, or organized health care arrangement, and the PHI was not further used or disclosed; and
- (3) A disclosure of PHI where there is a good-faith belief by the covered entity or business associate that an unauthorized person to whom the disclosure was made would not reasonably have been able to retain such

295. See generally American Recovery and Reinvestment Act of 2009, tit. XIII.

296. Breach Notification for Unsecured Protected Health Information, 74 Fed. Reg. 42,740 (Aug. 24, 2009) (to be codified at 45 C.F.R. pts. 160, 164).

297. The interim final rule defines "breach" as the "acquisition, access, use, or disclosure of protected health information" in a manner not permitted by the HIPAA Privacy Rule, "which compromises the security or privacy of the PHI." *Id.* at 42,743.

298. The interim rule defines "unsecured PHI" as PHI that is not rendered unusable, unreadable or indecipherable to unauthorized individuals through the use of a technology or methodology specified by the Secretary of HHS. Accordingly, if PHI is secured by one of the methods or technologies listed above, notification is not required under the rule, even if the PHI was used or disclosed in violation of the HIPAA privacy rule. *Id.* at 42,748.

299. See generally *id.*

information.³⁰⁰

If any of these exceptions applies, notification is not required under the interim final rule. Otherwise, a covered entity must notify affected individuals and HHS for all breaches under the interim final rule.³⁰¹ Depending on the size of the group affected and the availability of contact information, media notice may also be required.³⁰² All notifications must be given to the affected individual without unreasonable delay, but no later than sixty days after discovery. A breach is considered “discovered” on the first day the breach is known, or by reasonable diligence would have been known, to the covered entity.³⁰³ The interim final rule requires business associates to notify the covered entity under the same standard. Business associates are not required to provide the notifications themselves.

A covered entity must notify an affected individual via first-class mail at his or her last known address or, if the individual has agreed to receive electronic notice, via e-mail.³⁰⁴ The interim final rule specifies that for deceased individuals, the covered entity must provide the notification to the individual’s next of kin or personal representative.³⁰⁵ The notice must contain at least the following elements, in plain language:

- (1) A brief description of what happened, including the date of breach and the date of discovery of the breach;
- (2) A description of the types of unsecured PHI involved in the breach (i.e., whether full name, Social Security number, date of birth, home address, account number, diagnosis, disability code or other types of information were involved);
- (3) Any steps that individuals should take to protect themselves from potential harm resulting from the breach;
- (4) A brief description of what the covered entity is doing to investigate the breach, to mitigate the harm to individuals and to protect against any further breaches; and
- (5) Contact procedures for individuals to ask questions or learn additional information, which must include a toll-free telephone number, an e-mail address, Web site, or postal address.³⁰⁶

Similarly, on August 25, 2009, the Federal Trade Commission (FTC) published final regulations implementing the breach notification provisions for personal

300. *Id.* at 42,746-47.

301. *Id.* at 42,748-49.

302. For breaches involving more than 500 residents, a covered entity must also notify prominent media outlets. In such instances, a covered entity must also notify HHS at the same time, in the manner and form to be prescribed on HHS’s website. *Id.* at 42,751.

303. *Id.* at 42,749.

304. *Id.* at 42,750.

305. *Id.*

306. *Id.* The interim final rule specifies that the requisite information may be given in separate notices, if necessary.

health record vendors and their third party service providers.³⁰⁷ This interim final rule was effective September 24, 2009.

For purposes of determining the information to which the HHS and FTC breach notification regulations apply, HHS also issued—first on April 27, 2009,³⁰⁸ and then later with its interim final rule—the guidance required by the HITECH Act specifying the technologies and methodologies that render PHI unusable, unreadable, or indecipherable to unauthorized individuals.

2. *Increased Civil Monetary Penalties.*—To conform the provisions of the enforcement rule to the new tiered and increased civil money penalty structure made effective by the HITECH Act on the day after enactment (February 18, 2009), HHS published an interim final rule on October 30, 2009 that became effective November 30, 2009.³⁰⁹

3. *2010 Notice of Proposed Rulemaking.*—On July 14, 2010, HHS formally published its proposed regulations implementing changes made to the privacy, security, and enforcement rules by HITECH.³¹⁰ When finalized, the new regulations will implement the statutory amendments made to HIPAA under HITECH. The proposed rules concern the privacy and security standards issued pursuant to HIPAA, as well as the enforcement rules that implement HIPAA's civil money penalty authority.

Although the effective date of February 17, 2010 for many HITECH provisions has passed, the proposed rules and final rule (expected in March of 2011) provide specific information regarding the expected date of compliance and enforcement of the new requirements. HHS has recognized that it would be difficult for covered entities and business associates to comply with the new regulations until after these rules are finalized. Therefore, for most provisions, HHS intends to set the effective date for compliance at 180 days after the final rule is published.

4. *Extending Privacy Requirements to Business Associates.*—Historically, HIPAA applied to business associates only indirectly through business associate agreements with covered entities. HITECH requires business associates to comply not only with the privacy terms required in HIPAA business associate agreements, but also with “additional” privacy requirements.³¹¹ The proposed rules modify the privacy rule in several ways to address the permitted and required uses and disclosures of PHI by business associates.³¹²

307. Health Breach Notification Rule, 74 Fed. Reg. 42,962 (Aug. 25, 2009).

308. Guidance Specifying the Technologies and Methodologies That Render Protected Health Information Unusable, Unreadable, or Indecipherable to Unauthorized Individuals, 74 Fed. Reg. 19,006 (Apr. 27, 2009).

309. HIPAA Administration Simplification: Enforcement, 74 Fed. Reg. 56,123 (Oct. 30, 2009).

310. Modifications to the HIPAA Privacy, Security, and Enforcement Rules Under the Health Information Technology for Economic and Clinical Health Act, 75 Fed. Reg. 40,868 (July 14, 2010) (to be codified at 45 C.F.R. pts. 160, 164).

311. American Recovery and Reinvestment Act of 2009, tit. XIII, § 13404.

312. See 45 C.F.R. § 164.502.

First, HHS proposes to modify the rules to clarify that a business associate, like a covered entity, may only use or disclose PHI as permitted or required by the privacy rule or the enforcement rule.³¹³ The proposed changes also clarify the particular sections of the privacy rule that apply only to covered entities.³¹⁴

Second, HHS proposes that business associates may use or disclose PHI only as permitted or required by the business associate agreement, for the business associate's own management and administration, or for the provision of data aggregation services relating to the health care operations of the covered entity.³¹⁵ If the business associate and covered entity have failed to enter into a business associate agreement or other arrangement, then the business associate may use or disclose the PHI only as necessary to perform its obligations for the covered entity.³¹⁶ The proposed rule continues to place the burden on the covered entity to obtain a business associate agreement.³¹⁷ Notably, however, a person or entity that meets the definition of "business associate" under the regulations would still be required to follow the applicable portions of the privacy rule regardless of whether a business associate agreement is in place. The proposed rule also makes it clear that a business associate would not be permitted to use or disclose PHI in a way that would violate the requirements of the privacy rule.³¹⁸

Third, business associates also would be required to disclose PHI to the Secretary of HHS to investigate or determine the business associate's compliance with the privacy rule.³¹⁹ Business associates also would be required to disclose PHI to the covered entity, individual, or individual's designee, as necessary, to satisfy the covered entity's obligations to respect an individual's request for an electronic copy of PHI.³²⁰

Finally, the proposed rule also would apply the minimum necessary standard directly to business associates.³²¹

5. *Proposed Security Rule Changes Affecting Business Associates.*—HITECH applies the primary requirements of the HIPAA security rule to business associates, including the requirement that business associates implement administrative, physical, and technical safeguards and meet the policies and documentation standards. The proposed rule introduced an expansion of the statutory requirement under HITECH by proposing that a business associate would be required to comply with the entire HIPAA security rule.³²²

313. *Id.*

314. *Id.*

315. *Id.* at 40,919-20.

316. *Id.* at 40,919.

317. *Id.* at 40,919-20.

318. *Id.* at 40,919.

319. *Id.*

320. *Id.*

321. *Id.*

322. Modifications to the HIPAA Privacy, Security, and Enforcement Rules Under the Health Information Technology for Economic and Clinical Health Act, 75 Fed. Reg. 40,868, 40,872 (July 14, 2010).

Also, to be consistent with the privacy rule, the proposed security rule revisions also would require business associates to have business associate agreements with their subcontractors, as discussed in more detail below.

6. *New “Subcontractor” Category.*³²³—The regulations propose to expand the definition of “business associate” to include the new category of “subcontractors,” which are individuals or agencies that act on behalf of a business associate in a manner that requires access by the subcontractor to the covered entity’s protected health information. Under the proposed language, a subcontractor need not have entered into a formal business associate agreement to be subject to the same rules and regulations that apply to the business associate.³²⁴ Accordingly, any such individual or agent is included under the proposed definition.

7. *Requirements for Business Associate Agreements.*³²⁵—Under the proposed rules, covered entities will no longer be required to report to HHS when a pattern or practice of a business associate violates the business associate agreement and termination of the arrangement is not feasible. According to commentary contained in the proposed regulations, such a requirement is no longer necessary in light of the breach notification rule and the direct liability of business associates under HITECH.

Business associates will be required to take reasonable steps to cure violations of a business associate subcontractor agreement if the business associate becomes aware of a pattern or practice of a subcontractor that violates the agreement.³²⁶ This provision simply requires business associates to respond to noncompliance by their subcontractors in the same way that covered entities are required to respond to noncompliance by their business associates.

Business associate agreements will be required to include provisions providing that business associates will do the following:

- (1) Comply with the security rule with regard to electronic protected health information;
- (2) Report breaches of unsecured PHI to covered entities in accordance with the breach notification rule;
- (3) Ensure that their subcontractors agree to the same restrictions and conditions as apply to the business associate; and
- (4) Comply with the privacy rule requirements as if it were the covered entity in those instances when the business associate is carrying out the covered entity’s obligation under the privacy rule.³²⁷

The proposed rules also stipulate that business associate subcontractor agreements will be required to meet all of the requirements applicable to business associate agreements.

323. *Id.* at 40,873.

324. *Id.*

325. *See generally id.* at 40,887.

326. *Id.* at 40,888.

327. *Id.* at 40,889.

HHS has acknowledged the anticipated administrative burden and cost to implement the revised business associate agreement provisions of the privacy and security rules. Therefore, the proposed rules introduce transition provisions that allow covered entities and business associates to continue to operate under certain existing contracts for up to one year beyond the compliance date.³²⁸

B. Other Changes to the Privacy Rule

1. *Access to Electronic Protected Health Information.*—Currently, the privacy rule provides individuals with the right to access and request copies of their PHI.³²⁹ The proposed rules state that covered entities must provide access to hard copy or electronic PHI in both the form and format requested by the individual, if such PHI is readily available in that form or format. If it is not, the covered entity must provide access to a legible alternative form and format agreed upon by the individual and the covered entity.³³⁰ Additionally, if the PHI requested is maintained electronically and the individual requests it in electronic form, the covered entity must provide the PHI in the electronic form requested if it is readily producible in that form. If it is not readily producible in that form, the covered entity must provide the PHI in an alternate electronic form. The covered entity may still charge a reasonable cost-based fee for any electronic media it provides.³³¹ The proposed rules also provide that covered entities must honor patients' written requests to transmit PHI to another designated individual, provided that the request contains the patient's signature and clearly identifies the recipient and where to send a copy of the PHI.

2. *Restrictions on PHI Disclosures for Services Paid Out of Pocket in Full.*³³²—HIPAA provides an individual the right to request restrictions on how a covered entity uses and discloses his or her PHI, but covered entities are not required to agree to such requests. HITECH, however, changed this for disclosures relating to services for which the individual paid out of pocket in full.³³³ The proposed rules implement that change and clarify that covered entities are required to comply with a patient's request to restrict disclosure of PHI to a health plan if: the PHI relates exclusively to health care items or services provided; the patient (or an individual on the patient's behalf) paid for the items or services in full; and disclosure is not otherwise legally required. Covered entities are also prohibited from disclosing the restricted PHI to the health plan's business associates.

3. *Additional Provisions in Notices of Privacy Practices.*—The proposed rules require covered entities to ensure that their notices of privacy practices include language stating that:

328. *Id.*

329. *Id.* at 40,901.

330. *Id.*

331. *Id.* at 40,902.

332. *Id.* at 40,905.

333. *Id.*

- (1) Most disclosures of PHI for remuneration will require the individual's authorization;
- (2) Most uses and disclosures of psychotherapy notes will require the individual's authorization;
- (3) Most uses and disclosures for marketing purposes will require the individual's authorization; and
- (4) The individual has the right to request restrictions on PHI disclosures for services paid out-of-pocket in full.³³⁴

Additionally, if a health care provider intends to send communications regarding treatment alternatives or other health-related products or services and the provider will receive financial remuneration in return for making the communication, the provider's notice of privacy practices must inform the individual of that intention as well as the individual's ability to opt out of receiving such communications.

4. *Marketing*.—The new rules revise the definition of marketing to exclude certain types of communications from the term. Under HIPAA, marketing is defined as “a communication about a product or service that encourages recipients of the communication to purchase or use the product or service.”³³⁵ HITECH maintained that definition but clarified that “marketing” does not include several types of communications. First, it does not include communications for treatment of an individual by a health care provider—“including case management or care coordination for the individual, or to direct or recommend alternative treatments, therapies, health care providers, or settings of care to the individual.”³³⁶ Second, it does not include communications to “provide refill reminders or otherwise communicate about a drug or biologic that is currently being prescribed for the individual, only if any financial remuneration received by the covered entity in exchange for making the communication is reasonably related to the covered entity's cost of making the communication.”³³⁷

Furthermore, communications for the following health care operations activities are not “marketing,” except where the covered entity receives financial remuneration in exchange for making the communication:

- (A) To describe a health-related product or service (or payment for such product or service) that is provided by, or included in a plan of benefits of, the covered entity making the communication, including communications about: The entities participating in a health care provider network or health plan network; replacement of, or enhancements to, a health plan; and health-related products or services available only to a health plan enrollee that add value to, but are not part

334. *Id.*

335. *Id.* at 40,918.

336. *Id.*

337. *Id.*

of, a plan of benefits; or (B) For case management or care coordination, contacting of individuals with information about treatment alternatives, and related functions to the extent these activities do not fall within the definition of treatment.³³⁸

If marketing involves direct or indirect financial remuneration, the authorization obtained from the individual must disclose that such remuneration is involved.³³⁹

a. Sale of PHI.—Under the proposed rules, the sale of PHI for any direct or indirect financial remuneration generally would necessitate a prior written authorization, which must explain that the covered entity will receive remuneration for the disclosures.³⁴⁰ Such PHI could be exchanged for direct or indirect remuneration in the following circumstances without prior written authorization:

- (1) Disclosures of PHI for public health activities;
- (2) Disclosures of PHI for research purposes if the remuneration received is a reasonable cost-based fee to cover the actual cost of providing the PHI;
- (3) Disclosures of PHI for treatment or payment purposes;
- (4) Disclosures of PHI for “the sale, transfer, merger, or consolidation of all or part of the covered entity and for related due diligence”;
- (5) Disclosure of PHI to the individual or to provide an accounting of disclosures to the individual;
- (6) Disclosures required by law;
- (7) Disclosures otherwise permitted by the privacy rule; and
- (8) Disclosures of PHI for payment purposes.³⁴¹

b. Fundraising.—The proposed rules require a covered entity’s notice of privacy practices to disclose that the individual may be contacted for fundraising purposes and that the individual may opt out of being contacted at any time.³⁴² In addition, every fundraising communication must include a “clear and conspicuous” option to opt out of further fundraising communications. The opt-out method cannot be unduly burdensome or cause the individual to incur more than a nominal cost.³⁴³

c. Minimum necessary rule.—The HITECH Act currently provides that a covered entity will be deemed to have complied with the minimum necessary principle if it limits uses and disclosures of PHI to a limited data set, to the extent

338. *Id.*

339. For these purposes, “financial remuneration” means “direct or indirect payment from or on behalf of a third party whose product or service is being described. Direct or indirect payment does not include any payment for treatment of an individual.” *Id.* at 40,919.

340. *Id.* at 40,890.

341. *Id.*

342. *Id.* at 40,896.

343. *Id.*

practicable.³⁴⁴ This statutory requirement is currently effective but will sunset on the effective date of guidance HHS is required to issue on this topic. To prepare for its release of that guidance, HHS has requested comments on what aspects of the minimum necessary standard covered entities and business associates would find most helpful to have HHS address, as well as any questions about how to appropriately determine what constitutes the “minimum necessary” to comply with the privacy rule.³⁴⁵

*d. Compound authorization for research.*³⁴⁶—In general, authorizations required by the privacy rule cannot be combined with other documents, and the provision of treatment or payment, enrollment in a health plan, or eligibility for benefits may not be conditioned on receipt of an authorization unless the treatment is research-related. In the proposed rule, HHS set forth limited exceptions for research authorizations whereby covered entities would be permitted to combine conditioned and unconditioned authorizations presented for research purposes—provided that the authorizations clearly denote which, if any, research components are conditioned upon receipt of authorization and clearly disclose individuals’ right to opt in to any unconditioned research activity. In addition, HHS is seeking comment on whether and how the privacy rule could be amended to permit authorization for future or secondary research uses of PHI.³⁴⁷

*e. Decedent’s health information.*³⁴⁸—HHS has proposed to remove from the definition of PHI decedent’s health information after fifty years of the decedent’s death. Also, the proposed rule revises the definition of “individually identifiable health information” so that information regarding persons who have been deceased for more than fifty years will not constitute PHI.³⁴⁹ Also, the proposed rule will expand access to a decedent’s PHI to family members and others involved in the care of the patient prior to death, unless doing so is inconsistent with the decedent’s previously expressed preference.

f. Disclosure of student immunization records.—The proposed rule acknowledges that state law may now require schools to acquire student immunization records prior to enrollment.³⁵⁰ In states with such requirements, covered entities would be permitted to disclose student immunization records to schools based on a parent’s oral agreement, as opposed to written authorization.³⁵¹

*g. Changes to the enforcement rule.*³⁵²—HITECH modified the potential civil money penalties under HIPAA, creating a structure whereby penalties are

344. *Id.*

345. *Id.*

346. *Id.* at 40,907.

347. *Id.*

348. *Id.* at 40,894.

349. *Id.*

350. *Id.* at 40,895.

351. *Id.* (with codification to be at 45 C.F.R. § 164.512(b)).

352. *Id.* at 40,875.

tiered based on the covered entity's perceived culpability for the violation. Accordingly, violations would become more severe based on whether the circumstances involved "reasonable cause" or "willful neglect."³⁵³ HHS published an interim final rule in October of 2009 clarifying the penalty structure,³⁵⁴ and the proposed rule further clarified that structure.

The proposed rule modified the definition of "reasonable cause" to mean "an act or omission in which a covered entity or business associate knew, or by exercising reasonable diligence would have known, that the act or omission violated an administrative simplification provision, but in which the covered entity or business associate did not act with willful neglect."³⁵⁵

VII. INDIANA LEGISLATIVE UPDATE

A. Bodily Substance Samples Procedures in Hospitals

Effective March 12, 2010, Senate Enrolled Act 342 amends a provision of the state's implied consent law, clarifying that bodily substance samples taken in a hospital may be taken by any person who is trained in taking such samples and who is acting under the direction of, or under a protocol approved by, a physician.³⁵⁶ The clarification in the law was sought by the Indiana Prosecuting Attorneys Council as a result of a 2009 Indiana Court of Appeals case in which the court ruled that blood drawn by a certified lab technician within a hospital was inadmissible as evidence in a criminal investigation because a "certified lab technician" was not listed in the law as an individual authorized to take samples for evidentiary purposes.³⁵⁷ In addition, the court held that the evidence was inadmissible because the certified lab technician did not technically adhere to the hospital's physician-approved protocol when drawing the blood.³⁵⁸

B. Paternity Affidavits Executed in Hospitals

Effective July 1, 2010, Senate Enrolled Act 178 made changes to the legal consequences of paternity affidavits executed for children born out of wedlock, ultimately allowing the mother and the supposed father to agree to share joint legal custody of the child.³⁵⁹ Notably for hospitals and their staff, paternity affidavits executed in the hospital within seventy-two hours of the child's birth must be presented to the mother and the supposed father separately before they are signed.³⁶⁰ In addition, hospital staff must offer individuals under the age of

353. *Id.*

354. HIPAA Administrative Simplification: Enforcement, 74 Fed. Reg. 56,123 (Oct. 30, 2009).

355. 75 Fed. Reg. at 40,878.

356. *See generally* IND. CODE § 9-30-6-6(j) (2011).

357. *Brown v. State*, 911 N.E.2d 668, 673 (Ind. Ct. App. 2009).

358. *Id.* at 672-73.

359. *See generally* 2010 Ind. Acts 321-27, 329-30.

360. IND. CODE § 16-37-2-2.1(p).

eighteen an opportunity to consult with an adult regarding the contents of the paternity affidavit before signing it.³⁶¹

C. Uniform Cease and Desist Order

Effective July 1, 2010, Senate Enrolled Act 356, the state's omnibus professional licensing bill, made several changes that will affect the state's health care practitioners. Most notably, the act establishes a uniform procedure to allow the board of a regulated profession to issue a cease and desist order against a person who is participating in activities that require a license, certification, or registration.³⁶² The uniform process will allow a board to file a complaint with the attorney general.³⁶³ The attorney general will then investigate and may file a motion for a cease and desist order with the appropriate board.³⁶⁴ The board will have the option of holding a "show cause" hearing, and based on the findings of that hearing, it may issue a cease and desist order regarding the same.³⁶⁵ A cease and desist order issued under the new uniform process is enforceable in the circuit or superior courts.³⁶⁶

D. Dispensing to an Individual Unknown to a Retail Pharmacist

Effective July 1, 2010, Senate Enrolled Act 356 also prohibits a retail pharmacist, pharmacy technician, or person authorized by a pharmacist to dispense a controlled substance ("dispensing individual") from dispensing a controlled substance to a customer who is not personally known to the dispensing individual, unless the customer provides proof of identification.³⁶⁷

E. INSPECT: Good Faith Reporting to Law Enforcement

Effective July 1, 2010, Senate Enrolled Act 356 also amends the state's collection and tracking program (INSPECT) by attempting to grant practitioners civil and criminal immunity when they, in good faith, report possible drug seeking patients to law enforcement.³⁶⁸ It should be noted that despite the civil and criminal immunity, practitioners are still bound by state and federal privacy laws, including HIPAA.³⁶⁹ As a result, practitioners will still need to have either the patient's authorization or meet a HIPAA exception prior to releasing any INSPECT information to law enforcement.

361. *Id.* § 16-37-2-2.1(r).

362. *See generally* 2010 Ind. Acts 932-1010, 947-48.

363. IND. CODE § 25-1-7-14(a).

364. *Id.* § 25-1-7-14(a)(1).

365. *Id.* § 25-1-7-14(a)(2).

366. *Id.* § 25-1-7-14(d).

367. *See generally* 2010 Ind. Acts 932-1010, 1002.

368. *See generally id.* at 1006.

369. *See generally id.* at 1002-06.

F. Abandoned Medical Records

Effective July 1, 2010, Senate Enrolled Act 356 establishes procedures for the attorney general to take possession of, store, maintain, transfer, protect, and destroy abandoned health records and other records containing personally identifying information.³⁷⁰ The law requires the attorney general to make reasonable efforts to notify the patients named in the records that the attorney general has taken possession of the records.³⁷¹ Unless prohibited by law, the law also authorizes the attorney general to notify professional organizations, hospitals, law enforcement agencies, and government units, “who may be able to assist in notifying persons whose records were abandoned and secured by the attorney general.”³⁷²

370. *See generally id.* at 933-35.

371. IND. CODE § 4-6-14-7(a).

372. *Id.* § 4-6-14-7(b).

SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

RICHARD K. SHOULTZ*

The Indiana appellate courts continue to address a number of fact scenarios and coverage issues affecting automobile, homeowners', and commercial general liability insurance policies. This Article examines the most significant decisions that were addressed during this survey period¹ and their impact upon the field of insurance law.²

I. AUTOMOBILE COVERAGE CASES

A. Insured's Uninsured Motorist Claim Was Not Barred by Limitation of Action Clause in Policy When Coverage for Defendant Motorist Was Withdrawn

When an insured is involved in a motor vehicle accident with another motorist and sustains personal injuries, the insured often files a lawsuit against the other motorist and the insured's own automobile insurer. If the motorist lacks liability insurance, the insured will seek to recover uninsured motorist coverage from the automobile insurer. However, many times, when the motorist has liability insurance, the insured includes the automobile insurer as a defendant to recover underinsured motorist coverage, even when it has not been demonstrated that the motorist is an underinsured motorist. In *Bradshaw v. Chandler*,³ the Indiana Supreme Court was asked to address whether an uninsured motorist claim was time-barred by a policy provision when the insured learned late that the uninsured motorist claim existed.

After being involved in an accident with another motorist, the injured plaintiff in *Bradshaw* filed suit against the other motorist and Affirmative, his

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1. The survey period for this Article is approximately October 1, 2009 through September 30, 2010.

2. Selected cases which were decided during the survey period, but are not addressed in this Article, include *American Family Mutual Insurance Co. v. C.M.A. Mortgage, Inc.*, 682 F. Supp. 2d 879 (S.D. Ind. 2010) (holding that commercial general liability insurance company's supply of a defense under reservation of rights and separate filing of declaratory judgment action preserved rights to prevent insured from entering into consent judgment); *Wilson v. American Family Mutual Auto Insurance Co.*, 683 F. Supp. 2d 886 (S.D. Ind. 2010) (determining that in case involving uninsured motorist, insurance company did not breach its duty to deal with insured in good faith on soft tissue claim); *Buckeye State Mutual Insurance Co. v. Carfield*, 914 N.E.2d 315 (Ind. Ct. App. 2009) (determining that based upon factual evidence presented, automobile was not regularly available for insured's use to be excluded under automobile liability policy), *trans. denied*, 929 N.E.2d 783 (Ind. 2010); *Cincinnati Insurance Co. v. Trosky*, 918 N.E.2d 1 (Ind. Ct. App. 2009) (finding that excess insurer was obligated to provide uninsured motorist coverage despite the fact that underlying underinsured motorist insurers did not issue payment because of self-insured status of tortfeasor), *trans. denied*, 929 N.E.2d 789 (Ind. 2010).

3. 916 N.E.2d 163 (Ind. 2009).

own insurance company.⁴ In his complaint, the plaintiff alleged that Affirmative owed him underinsured motorist coverage because of the accident.⁵ The other motorist initially received liability insurance coverage through a policy issued to the vehicle's owner.⁶ However, that insurer eventually notified the injured plaintiff that this motorist was an excluded driver under the policy such that no liability coverage was available to the motorist for the injured plaintiff's lawsuit.⁷

At this point, the plaintiff amended his complaint to allege that Affirmative owed uninsured rather than underinsured motorist coverage.⁸ The insurer contended that the plaintiff's new claim for uninsured motorist coverage was barred by a two year policy limitation of action clause that required the insured to bring suit against the insurer within two years of the accident.⁹ The insurer argued that because the plaintiff's suit to recover uninsured motorist coverage was not brought within two years of the accident (even though the insurer was a defendant because of the underinsured motorist claim), the action was time-barred.¹⁰ The trial court granted the insurer's motion for summary judgment,¹¹ and the court of appeals affirmed.¹²

However, the Indiana Supreme Court reversed.¹³ While observing that contractual limitations that reduce the time to file a lawsuit were not favored, the court recognized that they do offer insurers protection from delays by insureds that could potentially prejudice an insurer's ability to investigate a claim.¹⁴ However, in this case, because the insurance company was already a defendant, the purpose behind enforcement of the contractual limitation was lacking.¹⁵ Furthermore, it was impractical to expect an insured to identify at the beginning of the lawsuit filing whether the claim was for uninsured or underinsured motorist coverage when the insured could not have known which policy coverage applied.¹⁶

4. *Id.* at 165.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 166. The court of appeals decision is an unpublished table disposition located at 900 N.E.2d 510 (Ind. Ct. App. 2008).

13. *Bradshaw*, 916 N.E.2d at 168.

14. *Id.* at 167. By prompting insureds to give timely notice, insurers obtain the necessary information to form "business judgments concerning claim reserves and premium rates." See *Summers v. Auto-Owners Ins. Co.*, 719 N.E.2d 412, 414 (Ind. Ct. App. 1999).

15. *Bradshaw*, 916 N.E.2d at 167.

16. *Id.*

B. Court Addressed Choice of Law Question and Concluded That Employee Was "Using" Covered Auto to Be Entitled to Uninsured Motorist Coverage Despite Lack of Physical Contact

The decision in *Stonington Insurance Co. v. Williams*¹⁷ offered analysis by the Indiana Court of Appeals on the choice of law for insurance policy questions as well as the application of the uninsured motorist statute. *Stonington* involved a Wisconsin moving company that acquired an automobile insurance policy from a Colorado broker and California insurance company.¹⁸ In seeking the automobile policy, the insured executed an application where it selected uninsured/underinsured motorist insurance limits that equaled the liability limits.¹⁹ However, the policy issued by the insurer provided for liability insurance coverage of \$1 million, but only offered uninsured motorist coverage of \$100,000.²⁰

After the policy was issued, the moving company requested that the insurer include an Indiana company as an additional insured to the policy.²¹ The insurance company subsequently amended the policy to add the Indiana company as an additional insured.²² The problem in this case arose when an employee of the Indiana company loaded a trailer in Indiana for a trip to New York.²³ The employee had completed his pre-trip inspection and had his hand near the door of the tractor to begin to get inside when an uninsured motorist lost control and collided with the tractor.²⁴ As a result of this accident, the employee sustained significant personal injuries.²⁵

The employee filed a complaint against the insurer contending that he was entitled to recover uninsured motorist benefits under the policy.²⁶ The insurer denied the employee's claim and filed a motion for summary judgment, contending that the employee did not qualify as an insured under the policy at the time of the accident.²⁷ The trial court granted partial summary judgment in favor of the employee and concluded that Indiana law—not Wisconsin law—applied.²⁸ Furthermore, the trial court found that based upon the requirements of Indiana's uninsured motorist statute,²⁹ the policy was to be reformed to provide for one million dollars of insurance coverage for the employee's uninsured motorist

17. 922 N.E.2d 660 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 818 (Ind. 2010).

18. *Id.* at 663.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 664.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. IND. CODE § 27-7-5-2 (2011).

claim.³⁰

On appeal, the first issue that the court addressed was whether Wisconsin or Indiana law applied. The court concluded that there was a conflict between the laws of the State of Indiana and the State of Wisconsin such that the court needed to determine which state's substantive law applied.³¹ In addressing the choice of law question, the court observed that Indiana followed "the most significant relationship" test, which requires the court to take into account the following factors in deciding which state's law would apply: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil[e], residence, nationality, place of incorporation, place of business of the parties."³² However, the court also observed that if an insurance issue is involved in a choice of law question, greater preference will be given to the state where "the parties understood was to be the principal location of the insured risk during the term of the policy, unless . . . some other state has a more significant relationship."³³

The court of appeals found that because the issue before it involved a question of the extent of applicable insurance available under the policy, the principal location of the insured risk provided the greater weight in deciding the conflict of law issue. After applying the facts and the other "significant contacts," the court found that no state had any more significance over the others.³⁴ The court then determined that based upon the fact that the accident happened in Indiana, its law applied.³⁵

The next question addressed by the court was whether under Indiana's uninsured motorist statute,³⁶ the employee met the definition of "insured" for purposes of being able to obtain underinsured motorist coverage. The court observed that a policy provision is contrary to the underinsured motorist statute if it "limits uninsured motorist protection as to persons who would otherwise qualify as insureds for liability purposes."³⁷ The policy provided that the definition of "insured" for liability coverage would include a person who was "using" a covered auto.³⁸ However, the uninsured motorist policy provision limited coverage for an "insured" who was "occupying" a covered auto.³⁹ The court found that because the definition under the underinsured motorist coverage differed from the definition and application of coverage provided under the liability section, the limiting distinction of the underinsured motorist coverage

30. *Stonington Ins. Co.*, 922 N.E.2d at 664.

31. *Id.* at 665.

32. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1971)).

33. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 (1971)).

34. *Id.* at 667.

35. *Id.*

36. IND. CODE §§ 27-7-5-2 to -6 (2011).

37. *Stonington Ins. Co.*, 922 N.E.2d at 669 (quoting *Harden v. Monroe Guar. Ins. Co.*, 626 N.E.2d 814, 819 (Ind. Ct. App. 1993)).

38. *Id.* at 670.

39. *Id.*

violated Indiana's uninsured motorist statute.⁴⁰

In this specific case, the court concluded that because the employee was in the process of getting into the truck at the time the accident occurred, he met the definition of "using" the vehicle and qualified as an insured. Previously, the Indiana Court of Appeals had determined that an individual can be "using" a vehicle even if the person is not actually inside the vehicle.⁴¹ As a consequence, the employee in this case was entitled to seek uninsured motorist coverage with limits of \$1 million.⁴²

This case offers a thorough assessment on determining the choice of law and the determination of the availability of uninsured motorist coverage. Practitioners may wish to review this decision if a question on either issue may arise.

C. Insured Could Not Recover Underinsured Motorist Coverage Under Umbrella Policy When Required Coverage from Underlying Policies Was Absent

On many occasions, insureds sustain catastrophic injuries, and there is insufficient liability coverage available from the tortfeasor to provide an appropriate remedy. Thus, many insureds acquire excess or umbrella liability coverage and look to that coverage to provide uninsured or underinsured motorist coverage. In the case of *Adkins v. Vigilant Insurance Co.*,⁴³ the court of appeals provided an excellent analysis of the purpose behind umbrella insurance coverage and the requirements that underlying insurance policies be in effect before coverage will exist.

In *Adkins*, a groundskeeper was seriously injured while operating a tractor on a roadway, as part of his employment, when he was struck by another vehicle which was insured by State Farm Insurance Company.⁴⁴ State Farm offered the full liability policy limits available for its insured driver to the groundskeeper in settlement of all claims to be asserted against State Farm's insured.⁴⁵ Because the limits offered by State Farm were not sufficient to address the groundskeeper's injuries, he next looked to his employer's insurance policies for underinsured motorist coverage.⁴⁶ The employer possessed a number of different policies, including an automobile liability policy with underinsured motorist coverage, a homeowners' policy with no underinsured motorist coverage, and an

40. *Id.*

41. *See Monroe Guar. Ins. Co. v. Campos*, 582 N.E.2d 865, 871 (Ind. Ct. App. 1991) (finding that tow truck operator was "using" vehicle while performing part of activities relating to towing business).

42. *Stonington Ins. Co.*, 922 N.E.2d at 671.

43. 927 N.E.2d 385 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 828 (Ind. 2010).

44. *Id.* at 387.

45. *Id.*

46. *Id.*

excess umbrella policy with underinsured motorist coverage.⁴⁷

In assessing the applicability of the policies, the trial court determined that no underinsured motorist coverage was available under the automobile policy because the tractor, being operated by the groundskeeper, was not an “insured vehicle” within that policy.⁴⁸ It was also determined that the homeowners’ policy did not provide underinsured motorist coverage because of exclusion for claims arising from use of an automobile.⁴⁹ However, the groundskeeper contended that he was entitled to pursue underinsured motorist coverage under the excess umbrella policy.⁵⁰ The terms of the excess umbrella policy required that the named insured maintain underlying insurance coverage before the excess umbrella policy applied. Specifically, the policy provided that the excess insurer “cover[ed] these damages in excess of the underlying insurance or the Required Primary Underlying Insurance, whichever is greater, if they are caused by an occurrence during the policy period, unless otherwise stated.”⁵¹

The excess umbrella insurer contended that because none of the “underlying policies”—the auto or homeowners’ policy—offered coverage in this matter, there was no underinsured motorist coverage available through the excess umbrella policy.⁵² However, the insured argued that because the policy language utilized a disjunctive “or” in specifying what it may require as “underlying insurance,” State Farm’s liability limits were sufficient to satisfy the “underlying insurance” requirement of the excess umbrella policy.⁵³

The court noted that with respect to excess or umbrella insurance coverage, such policies are written with an insurance company assessing its risk based on the assumption “that the insureds have or will procure and maintain the agreed upon primary policy [of insurance].”⁵⁴ In interpreting the language at issue, the court found that the “underlying insurance” provision was intended to require that the named insured have that underlying insurance in place.⁵⁵ In this particular case, because neither the automobile nor homeowners’ policies of the named insured applied, the requirement of an applicable underlying policy was absent such that the groundskeeper could not recover underinsured motorist coverage from the umbrella policy.⁵⁶

This case provided an excellent assessment of the purpose behind excess or umbrella insurance coverage in that it is intended to be a cost-effective means for individuals to protect themselves. Because the risk that was to be covered by the excess or umbrella insurance anticipated that the insured possessed primary

47. *Id.* at 387-88.

48. *Id.* at 388.

49. *Id.*

50. *Id.*

51. *Id.* at 391 (citation omitted).

52. *See id.*

53. *Id.* at 391-92.

54. *Id.* at 390.

55. *See id.* at 392-93.

56. *See id.*

policies, and none were present, the court concluded that no coverage existed under the umbrella policy.

D. Underinsured Motorist Insurer Could Not Remove Itself as Defendant in Lawsuit and Substitute Dismissed Underinsured Motorist as the Only Defendant for Trial

In personal injury lawsuits, defendants are able to exclude from evidence that a party defendant may possess liability insurance to pay for any judgment.⁵⁷ In *Howard v. American Family Mutual Insurance Co.*,⁵⁸ the court of appeals addressed whether an uninsured motorist insurer could remove itself completely from the caption of the case and have a dismissed tortfeasor substituted as the only defendant in the case for presentation before a jury.⁵⁹ In this case, the insured was involved in a motor vehicle accident with an underinsured driver in Kentucky.⁶⁰ At the time of the accident, the insured possessed underinsured motorist coverage with American Family Mutual Insurance Company (“American Family”).⁶¹ The tortfeasor possessed limited liability coverage, and after a lawsuit was filed in Kentucky against both the tortfeasor and the underinsured motorist company, the insurer for the tortfeasor offered its policy limits to the insured in exchange for a release.⁶² American Family agreed to let the insured accept the underinsured motorist’s policy limits, and the tortfeasor was dismissed as a defendant.⁶³ The case against American Family was also dismissed but then refiled in an Indiana court.⁶⁴

In responding to the insured’s complaint, American Family admitted that its policy provided underinsured motorist coverage.⁶⁵ Shortly before the case was to proceed to trial, American Family filed a motion to substitute the dismissed underinsured driver as the proper party defendant; it also filed a simultaneous motion in limine seeking to exclude all reference to American Family as a defendant.⁶⁶ The trial court granted American Family’s motions, which prompted an interlocutory appeal.⁶⁷

The Indiana Court of Appeals reversed the trial court’s decision to allow American Family to substitute the dismissed underinsured motorist as the only

57. See IND. R. EVID. 411.

58. 928 N.E.2d 281 (Ind. Ct. App. 2010).

59. *Id.* at 282.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* Apparently, there was a question whether the Kentucky court would have jurisdiction over American Family. *Id.* at 282 n.1.

65. *Id.* at 282.

66. *Id.*

67. *Id.* at 282-83.

party defendant.⁶⁸ The court concluded that an insured has the right to proceed to trial against his underinsured motorist carrier and that there can be no substitution of a dismissed underinsured motorist as a proper party defendant.⁶⁹ Specifically, the court held that “Indiana law provides no authority for substitution of a non-party tortfeasor as a nominal defendant in place of an insurer in a contract case, where the plaintiff seeks recovery of underinsured motorist benefits.”⁷⁰

It remains uncertain whether the *Howard* decision will have a universal impact in prohibiting efforts by an insurer to substitute an uninsured or underinsured motorist as a party defendant.⁷¹ The key to the court’s ruling appeared to be that the underinsured motorist was no longer a party to the proceedings and was therefore considered a “non-party.” To the extent that a lawsuit includes both the underinsured motorist and the underinsured motorist insurer, the insurer may be able to remove itself from being a party to the case if it agrees to be bound by the outcome of the lawsuit up to the extent of its underinsured motorist coverage.

II. COMMERCIAL GENERAL AND FARM LIABILITY CASES

A. Indiana Supreme Court Concludes That Insured Contractors Are Entitled to Coverage Under General Liability Insurance Policy for Faulty Workmanship Claims

The Indiana Supreme Court addressed an important insurance coverage question on whether insured builders have liability insurance coverage for alleged faulty workmanship when it decided *Sheehan Construction Co. v. Continental Casualty Co.*⁷² In deciding this case, the supreme court rejected a number of Indiana Court of Appeals decisions that had concluded that no coverage was available under a general liability policy for claims to repair or replace an insured’s faulty workmanship.⁷³ After this decision, builders have liability coverage under existing commercial general liability insurance policies

68. *Id.* at 284.

69. *See id.* at 284-85.

70. *Id.* at 284 (citing *Brown-Day v. Allstate Ins. Co.*, 915 N.E.2d 548, 552-53 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 791 (Ind. 2010)).

71. For a decision where substitution was permitted, see *Wineinger v. Ellis*, 855 N.E.2d 614, 616 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 448 (Ind. 2007) (permitting an uninsured motorist insurer to substitute the uninsured motorist as the sole named defendant when the insurer admitted liability and represented that it would pay the insured’s judgment up to the limits of coverage).

72. 935 N.E.2d 160, 161 (Ind.), *modified and aff’d on reh’g*, 938 N.E.2d 685 (Ind. 2010).

73. Specifically, *Sheehan* abrogated *Amerisure, Inc. v. Wurster Construction Co.*, 818 N.E.2d 998 (Ind. Ct. App. 2004), *clarified on reh’g*, 822 N.E.2d 1115 (Ind. Ct. App. 2005), and *R.N. Thompson & Assocs., Inc. v. Monroe Guarantee Insurance Co.*, 686 N.E.2d 160 (Ind. Ct. App. 1997).

for faulty workmanship claims unless current standard policy language is changed.

Sheehan was a general contractor hired by a number of homeowners to construct their homes in a residential subdivision.⁷⁴ As a general contractor, Sheehan utilized subcontractors who actually performed the work in constructing the homes.⁷⁵ One homeowner experienced water intrusion to his home that was caused by the faulty workmanship of the subcontractors.⁷⁶ As a result, the homeowner filed a lawsuit against Sheehan seeking damages for the costs to repair the faulty workmanship.⁷⁷

During the relevant time period, Sheehan possessed a commercial general liability (CGL) policy from Continental Insurance Company.⁷⁸ Most CGL policies provide coverage for “occurrences” that produce injury or property damage.⁷⁹ The term “occurrence” is generally defined as an “accident.”⁸⁰ The CGL policy also included a “your work” exclusion, which provided that coverage was not available for “[p]roperty damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard;” it also did not apply “if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.”⁸¹

After the filing of the homeowners’ lawsuit, Continental agreed to provide a defense to Sheehan under a reservation of rights.⁸² Other homeowners who were also experiencing water intrusion pursued lawsuits against Sheehan that resulted in the conversion of the homeowners’ lawsuits into a class action.⁸³ Eventually, a settlement was reached where Sheehan agreed to pay a monetary figure and assigned its rights to proceeds from the CGL policy to the homeowners; in exchange, the homeowners agreed not to pursue their claims against Sheehan.⁸⁴

Continental filed a declaratory judgment lawsuit in which it sought a judicial ruling that Continental did not owe a duty to indemnify Sheehan for the homeowners’ claims pursuant to the CGL policy.⁸⁵ Relying upon *R.N. Thompson* and *Amerisure*, Continental contended that the homeowners’ claims to recover

74. *Sheehan Constr. Co.*, 935 N.E.2d at 163.

75. *Id.*

76. *Id.*

77. *Id.* at 163-64.

78. *Id.* at 164.

79. The CGL policy language provided coverage for “sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ . . . caused by an ‘occurrence’ that takes place . . . during the policy period.” *Id.* (citation omitted).

80. *Id.*

81. *Id.* (citation omitted).

82. *Id.*

83. *Id.*

84. *Id.* Sheehan also assigned to the homeowners any claims it had against the subcontractors.

85. *Id.*

the costs to repair or replace the faulty workmanship did not demonstrate an “occurrence” or “property damage” to trigger the CGL coverage.⁸⁶ The trial court granted Continental’s motion for summary judgment, which was affirmed on appeal.⁸⁷

The Indiana Supreme Court observed that there was a split in authority around the country on whether claims for the repair of an insured’s faulty workmanship were covered under a CGL insurance policy.⁸⁸ In addressing this question, the Indiana Supreme Court rejected the earlier court of appeals decisions finding that no coverage existed.⁸⁹ Instead, the court concluded that unless the insured clearly intended to cause the faulty workmanship, any property damage that resulted from the insured’s construction activities would satisfy the definition of “occurrence” to trigger the insuring agreement of the CGL policy.⁹⁰

The court next turned its attention to whether the “your work” exclusion in the CGL policy applied to bar coverage. The first section of the exclusion eliminated coverage for the portion of Sheehan’s work that consisted of the construction of the home.⁹¹ However, the court observed that the specific exclusion in Sheehan’s policy contained an “exception” for work performed on Sheehan’s behalf by subcontractors that it hired.⁹² This “exception” reinstated coverage that the exclusion initially removed from the policy.⁹³ Consequently, based on the language of the CGL policy issued by Continental, Sheehan was entitled to coverage for the homeowners’ faulty workmanship claims.⁹⁴

Two justices dissented from the majority’s determination that Sheehan was entitled to coverage. Chief Justice Shepard concluded that a CGL policy was neither designed nor priced to cover the “warranty claims” asserted by the homeowners for a faulty workmanship claim.⁹⁵ Justice Sullivan believed that the costs to repair an insured’s faulty workmanship did not satisfy the definition of an “occurrence” to trigger a coverage obligation under a CGL policy.⁹⁶

This decision will significantly impact insureds and insurers in assessing faulty workmanship claims. CGL policies issued to builders will become performance bonds that provide insurance coverage whenever an insured constructs a defective building. Almost certainly, the insurance industry will respond by eliminating the “subcontractor exception” to the “your work”

86. *Id.* at 165.

87. *Sheehan Constr. Co. v. Cont’l Cas. Co.*, 908 N.E.2d 305 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, 929 N.E.2d 782 (Ind. 2010).

88. *Sheehan Constr. Co.*, 935 N.E.2d at 167-68. See *id.* n.4 & n.5 for examples of such cases.

89. See *id.*

90. *Id.* at 170.

91. *Id.* at 171.

92. *Id.*

93. *Id.*

94. *Id.* at 171-72.

95. See *id.* at 172 (Shepard, C.J., dissenting).

96. *Id.* (Sullivan, J., dissenting).

exclusion so that coverage will be excluded. Alternatively, insurance companies may respond to the increased risk of having to pay “warranty claims” of an insured by substantially increasing the premium paid by the builder to purchase a CGL policy.

B. Injured Contractor Employee’s Lawsuit Seeking Worker’s Compensation Benefits Was Covered Under Farm Liability Insurance Policy

In *Everett Cash Mutual Insurance Co. v. Taylor*,⁹⁷ the Indiana Supreme Court addressed a matter of first impression in determining whether insureds under a farm personal liability policy were entitled to liability insurance coverage from an injured contractor’s claim for worker’s compensation benefits. In acquiring insurance coverage, the insureds contacted their insurance agent and specifically asked for “all risk coverage” to cover any contractors who came onto their property.⁹⁸ Everett Cash Mutual Insurance Company (“Everett Cash”) provided a farm personal liability insurance policy.⁹⁹ The insureds contracted with a painting contractor whose employee sustained a shock injury after contacting an electrical wire.¹⁰⁰

The injured employee filed a lawsuit against the insureds seeking only to recover worker’s compensation benefits.¹⁰¹ His employer did not possess a worker’s compensation policy to cover injured employees.¹⁰² Indiana has a specific statute that permits employees of contractors to seek worker’s compensation benefits directly from entities that hire the contractor under certain circumstances:

The state, any political division thereof, any municipal corporation, any corporation, limited liability company, partnership, or person, contracting for the performance of any work exceeding one thousand dollars (\$1,000) in value by a contractor subject to the compensation provisions of . . . [Indiana Code section] 22-3-2 through . . . 22-3-6, without exacting from such contractor a certificate from the worker’s compensation board showing that such contractor has complied with section 5 of this chapter . . . shall be liable to the same extent as the contractor for compensation, physician’s fees, hospital fees, nurse’s charges, and burial expenses on account of the injury or death of any employee of such contractor, due to an accident arising out of and in the course of the performance of the work covered by such contract.¹⁰³

97. 926 N.E.2d 1008 (Ind. 2010).

98. *Id.* at 1010.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. IND. CODE § 22-3-2-14(b) (2011). It is important to note that this obligation does not apply to “an owner who contracts for performance of work on the owner’s owner occupied residential property.” *Id.* § 22-3-2-14(a)(1).

In filing the lawsuit against the insureds, the injured employee apparently sought the worker's compensation benefits afforded under the statute—rather than pursuing a premises liability cause of action against the insureds—in order to avoid having to prove that the owner was negligent.

The insureds submitted the injured employee's lawsuit to their insurance agent for coverage under the Everett Cash farm liability policy.¹⁰⁴ However, Everett Cash denied coverage, contending that the injured employee's lawsuit was for worker's compensation benefits that did not present an "occurrence" necessary to trigger liability coverage and was also excluded under the farm liability. Everett Cash relied upon the following exclusion, which stated:

Coverage L [liability coverage] does not apply to . . . bodily injury to a person, including a domestic employee, if the insured has a . . . [worker's] compensation policy covering the injury or if benefits are payable or are required to be provided by an insured under a . . . [worker's] compensation, non[-]occupational disability, occupational disease or like law.¹⁰⁵

As a result of the coverage denial, the insureds filed a lawsuit against Everett Cash for breach of contract.¹⁰⁶ Everett Cash moved for summary judgment at the trial court level, but the motion was denied.¹⁰⁷ An interlocutory appeal was pursued, and the court of appeals reversed the trial court.¹⁰⁸ The Indiana Supreme Court granted transfer of the case for consideration.¹⁰⁹

The supreme court initially rejected Everett Cash's argument that the injured employee's claim did not present an "occurrence" to trigger coverage.¹¹⁰ Because the injured employee's claim occurred as a result of an accident that produced bodily injury, the court found that this satisfied the definition to trigger a coverage obligation.¹¹¹

Next, the court found that the "worker's compensation" exclusion upon which Everett Cash relied was ambiguous and unenforceable.¹¹² Specifically, the court found that reasonable interpretations of the exclusionary language led to multiple conclusions and that it was ambiguous as applied to this insured.¹¹³ Because the insureds were farmers who did not operate a business, the court found it significant that they could not purchase worker's compensation insurance coverage to protect themselves from claims similar to that presented

104. *Taylor*, 926 N.E.2d at 1010.

105. *Id.* at 1012 (citation omitted).

106. *Id.* at 1010.

107. *Id.* at 1010-11.

108. *Id.* at 1011.

109. *Id.*

110. *Id.* at 1012.

111. *Id.*

112. *See id.* at 1013.

113. *Id.* at 1013-14.

by the injured subcontractor. The court noted,

Given that the . . . [insureds] could not have even purchased worker's compensation insurance to protect themselves from claims by . . . [the contractor's] employees, it is hard to imagine them thinking that an exclusion regarding worker's compensation could preclude them from having protection from a lawsuit by someone injured in an accident on their property.¹¹⁴

Consequently, the court determined that Everett Cash's policy language was ambiguous and construed the language against the insurer.¹¹⁵ Furthermore, the court commented that to the extent that Everett Cash wished to exclude claims seeking worker's compensation benefits from its liability coverage, it needed to refine the language so that it was clearer.¹¹⁶

This particular case provides good insight concerning an issue that many practitioners are probably unaware of: the possible requirement that in certain circumstances, an insured may be forced to supply worker's compensation benefits to injured employees of contractors coming upon their property. Thus, having the opportunity to provide that coverage through a liability policy is an extra benefit that insureds have gained through the *Taylor* decision.

C. Court Found That Insured Was Bound by Change in Insurance Policy Language Despite Lack of Notice

On many occasions, an insured never reads—or never has the opportunity to read—an insurance policy until after a loss occurs. On some occasions, policy language changes at a policy's removal from the time the policy was first acquired by the insured. In *Wurster Construction Co. v. Essex Insurance Co.*,¹¹⁷ the changes to a policy significantly affected an insured's entitlement to coverage following a construction accident.

Wurster Construction Company was a contractor on a construction project.¹¹⁸ Wurster subcontracted a portion of the construction work to an entity known as Kane Construction.¹¹⁹ Pursuant to Kane's subcontract with Wurster, Kane agreed to procure liability insurance coverage that would name Wurster as an additional insured and provide primary coverage over Wurster's own liability coverage.¹²⁰ Kane then subcontracted its work to Main Street Construction, but did not include any provision within its subcontract requiring Main Street to obtain liability insurance coverage for Kane or Wurster.¹²¹ A Main Street employee

114. *Id.* at 1014 (internal footnote omitted).

115. *Id.*

116. *Id.*

117. 918 N.E.2d 666 (Ind. Ct. App. 2009).

118. *Id.* at 669.

119. *Id.*

120. *Id.*

121. *Id.*

sustained fatal injuries after a fall during the construction project.¹²² As a result, the estate of the deceased worker filed a personal injury lawsuit against Wurster.¹²³

After the initial lawsuit was filed, Wurster and Kane presented a number of insurance claims (by various insurance policies) arising from the incident.¹²⁴ The pertinent part of the case for purposes of this survey Article¹²⁵ focused upon the appeal by Essex, Kane's insurance company, who argued in a declaratory judgment proceeding that it owed no liability insurance coverage to Kane for the estate's lawsuit.¹²⁶ Specifically, Essex contended that a policy provision excluded coverage for personal injury claims sustained by any employees of independent contractors utilized by Kane.¹²⁷ However, in addressing that issue, it was significant to see the history of the exclusion in the Essex policy.

With respect to the policy Essex initially wrote, Kane received coverage for injuries sustained by employees of independent contractors if "the [n]amed [i]nsured's [Kane's] actions or inactions . . . [were] the direct cause of the injury."¹²⁸ However, upon renewal of the policy, the policy language was amended to exclude from coverage all claims for bodily injury by employees of the independent contractors utilized by Kane.¹²⁹ The trial court denied Essex's motion for summary judgment and found that it owed coverage to Kane.¹³⁰

On appeal, the court analyzed the current Essex policy language, which did not appear to provide coverage to Kane.¹³¹ Kane argued that coverage existed, claiming to be unaware of the policy language changes Essex made at renewal. Further, Kane claimed that it never would have agreed to those changes if it was aware of their inclusion in the policy.¹³² The court focused upon the fact that Kane's insurance broker¹³³ was aware of changes to the policy such that the broker's knowledge was imputed to Kane.¹³⁴ As a result, the court of appeals reversed the trial court's denial of summary judgment to Essex and found that Essex did not owe liability coverage to Kane for the estate's lawsuit.¹³⁵

122. *Id.*

123. *Id.*

124. *Id.*

125. There was also a significant discussion by the court concerning the timeliness of appeals pursued in the matter.

126. *Wurster Constr. Co.*, 918 N.E.2d at 678.

127. *Id.* at 679.

128. *Id.* at 678 (citation omitted).

129. *Id.* at 678-79.

130. *Id.* at 679.

131. *Id.*

132. *Id.* at 680-81.

133. For a recent discussion by the Indiana Supreme Court on the meaning of an "insurance agent" or "insurance broker," see *Estate of Mintz v. Connecticut General Life Insurance Co.*, 905 N.E.2d 994, 1000-01 (Ind. 2009).

134. *Wurster Constr. Co.*, 918 N.E.2d at 681.

135. *Id.* at 681-82.

This case demonstrates the situation where insurance companies may issue policies that do not accurately reflect the intent of their insureds when they seek additional insured status for another party. Practitioners who represent named insureds as well as additional insureds may want to insist upon receiving and reviewing the actual insurance policy language to determine the extent of coverage provided to the additional insured. Moreover, they should verify if policy language is consistent with the requirements imposed in the contract between the named and additional insureds.

III. HOMEOWNERS' COVERAGE CASES

A. Insurance Company Could Not Assert a Cause of Action Against Public Adjuster Used by Insureds to Resolve Homeowners' Insurance Claim

When a homeowner sustains a fire, he may retain the services of a public adjuster¹³⁶ to assist in dealing with the insurance company on the adjustment of the claim. On many occasions, disputes between the public adjuster and the insurance company arise, which cause problems in resolving the insured's claim. In *Meridian Security Insurance Co. v. Hoffman Adjustment Co.*,¹³⁷ negotiations between a public adjuster and insurance company turned sour, which prompted the filing of lawsuits against each other.¹³⁸ These suits resulted in an appellate decision regarding whether any causes of action could be pursued by either party against the other.¹³⁹

A fire occurred at the home of the insureds, who had a homeowners' insurance policy with Meridian.¹⁴⁰ While the claim for damage to real property was being resolved between the insureds and their insurer, a dispute arose concerning the salvageability and value of the insured's personal property items.¹⁴¹ The homeowners eventually entered into a contract with a public adjuster to assist them in handling the claim for personal property damage.¹⁴² When the insurer sent a cleaning crew to transport and clean the insured's personal property, the cleaning crew was told not to take the property.¹⁴³ The

136. The Indiana Code defines a "public adjuster" as every individual or corporation who, or which, for compensation or reward, renders advice or assistance to the insured in the adjustment of a claim or claims for loss or damages under any policy of insurance covering real or personal property and any person or corporation who, or which, advertises, solicits business, or holds itself out to the public as an adjuster of such claims.

IND. CODE § 27-1-27-1 (2011).

137. 933 N.E.2d 7 (Ind. Ct. App. 2010).

138. *Id.* at 9-10.

139. *Id.* at 11.

140. *Id.* at 9.

141. *Id.*

142. *Id.*

143. *Id.*

homeowners submitted an inventory of the damaged property, but Meridian contended that the inventory was missing required information.¹⁴⁴ The public adjuster responded to Meridian's request for more details about the inventory by indicating that the homeowners' submission complied with Meridian's insurance policy requirements.¹⁴⁵

After the insureds rejected Meridian's settlement proposal for the personal property items, they requested an appraisal as to the value of the damaged personal property items.¹⁴⁶ Meridian refused to proceed to the appraisal process and stopped paying storage fees for the personal property items.¹⁴⁷ Because the homeowners could no longer pay the storage fees to retain the property, they subsequently destroyed those items.¹⁴⁸

Next, the homeowners filed a petition with the court for the appointment of an umpire.¹⁴⁹ Meridian responded by filing a counterclaim for declaratory judgment, contending that the insureds breached the policy by refusing to cooperate.¹⁵⁰ The homeowners amended their complaint to assert claims for breach of contract, failure to exercise good faith, adjuster negligence, and misrepresentation with respect to Meridian's handling of their claim.¹⁵¹ Meridian amended its counterclaim and contended that the insureds engaged in fraudulent behavior and that Meridian owed no further obligations to them.¹⁵² Additionally, Meridian added a third party complaint to argue that the public adjuster had breached the terms of the policy, failed to exercise good faith, and engaged in spoliation of evidence, fraud, and tortious interference with Meridian's contractual relationship with its insureds.¹⁵³ The public adjuster filed a motion for summary judgment as to each of the theories Meridian raised against him, contending that they were not valid under Indiana law.¹⁵⁴ The trial court granted the public adjuster's motion for summary judgment by specifically finding that the public adjuster was the agent of the insureds.¹⁵⁵ Because there was no contractual relationship between Meridian and the public adjuster, Meridian had

144. *Id.*

145. *Id.*

146. *Id.* Under many insurance policies, the parties can resolve their disputes about the value of a claim by seeking an appraisal. In such a case, the insured and insurer each select an appraiser, and those appraisers will attempt to agree upon a "neutral" umpire. If they cannot mutually select an umpire, either side may petition the court to select an umpire. The appraisers and the umpire will then determine the value of the claim, which is usually binding upon the parties.

147. *Id.* at 9-10.

148. *Id.* at 10 n.1.

149. *Id.* at 10.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 10-11.

155. *Id.* at 11.

no right to present a cause of action against the public adjuster.¹⁵⁶

The court of appeals affirmed the trial court's summary judgment in favor of the public adjuster.¹⁵⁷ Specifically, the court determined that the public adjuster acted solely as the agent of the insureds.¹⁵⁸ Because the insureds were already engaged in a contractual relationship with Meridian, any actions by the public adjuster could not be considered a "tortious interference" of the contract between the insureds and Meridian to establish a separate cause of action by Meridian against the public adjuster.¹⁵⁹ Likewise, the court found that any suggestion that the public adjuster committed fraud or breached a duty of good faith could not support independent causes of action in favor of Meridian, as no recognizable relationship existed between the public adjuster and Meridian.¹⁶⁰

The court also observed that because the public adjuster was the agent of the insureds, to the extent that his actions demonstrated a breach of the insurance policy, Meridian could assert the public adjuster's actions as defenses to any coverage obligation owed to the insureds.¹⁶¹ Similarly, with respect to Meridian's claims that the public adjuster may have spoliated evidence, the court found that Meridian's remedy was to assert a coverage defense against the insureds (as the principal to the public adjuster), not to assert an independent cause of action against the public adjuster.¹⁶²

*B. Court Refused to Enforce an Unoccupied Dwelling Exclusion
When Elderly Widow Became Ill and Vacated Home*

In *Estate of Luster v. Allstate Insurance Co.*,¹⁶³ an interesting discussion occurred regarding the applicability of a homeowners' policy exclusion when the insured is not occupying the dwelling and a loss occurs. In this matter, an elderly widow (who lived alone) sustained an injury from a fall.¹⁶⁴ After her hospitalization, she moved into an extended care facility.¹⁶⁵ She executed a power of attorney with her personal lawyer, who notified her homeowners' insurance company to bill his office for her homeowners' insurance premium payments.¹⁶⁶ The widow never returned to her house and eventually passed away at the extended care facility.¹⁶⁷

Approximately three months after her death (while the house was still

156. *Id.*

157. *Id.* at 16.

158. *Id.*

159. *Id.* at 12-13.

160. *Id.* at 14.

161. *Id.* at 13.

162. *Id.* at 15-16.

163. 598 F.3d 903 (7th Cir. 2010).

164. *Id.* at 905.

165. *Id.*

166. *Id.*

167. *Id.*

unoccupied), a fire occurred at the widow's former home, resulting in extensive damages.¹⁶⁸ The cause of the fire was never determined.¹⁶⁹ When the attorney asserted a homeowners' claim on behalf of the estate, the widow's insurer investigated and learned that the home had been unoccupied for approximately four and a half years before the widow's death.¹⁷⁰ As a result, the insurer denied coverage, relying upon a number of exclusions in the policy.¹⁷¹ Specifically, the insurer relied upon exclusions that required that the insurance company be notified of changes in the occupancy of the home and excluded coverage if a loss occurred to the property from occupancy changes increasing the risk of hazard. Moreover, the policy excluded coverage if an insured did not occupy the home for a period of more than thirty consecutive days.¹⁷² The estate filed a lawsuit against the insurance company for breach of the policy.¹⁷³ The trial court granted summary judgment to the homeowners' insurance company, which sought to enforce the policy exclusions.¹⁷⁴

On appeal, the Seventh Circuit Court of Appeals, applying Indiana law, determined that the fact that the house was unoccupied for four and a half years called into question the application of the policy exclusion for an unoccupied dwelling.¹⁷⁵ Although the court would not rule as a matter of law that coverage was excluded, it concluded that the evidence submitted showed that the insurance policy exclusions might apply.¹⁷⁶

Nevertheless, the court also determined that certain questions of fact prevented the entry of summary judgment—notably, whether the insurance company waived its reliance upon the “non-occupied dwelling” exclusion because it continued to collect premiums from the widow's attorney.¹⁷⁷ Specifically, the appellate record demonstrated that the homeowners' insurance company continued to collect premiums during most of the time the house was unoccupied.¹⁷⁸ Although the insurance company returned these premiums when it attempted to exclude coverage, the court ruled that the insurance company's actions created an issue of fact on whether it had waived its right to enforce the exclusion and cancel the policy.¹⁷⁹ As a result, the case was remanded back to the trial court for consideration and resolution of the disputed facts.¹⁸⁰

This case provided an excellent analysis of a situation where an insured's

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 905-06.

172. *Id.* at 906.

173. *Id.* at 905.

174. *See id.* at 907.

175. *Id.*

176. *Id.* at 912 (remanding for hearings on various exceptions).

177. *Id.* at 909-10.

178. *Id.* at 909.

179. *Id.* at 912.

180. *Id.*

property is not occupied by the actual insured. In *Estate of Luster*, the court refused to find as a matter of law that when an insured does not occupy a home for a period of more than thirty consecutive days (such as when insureds travel to a winter home), the insurance company has a right to exclude insurance coverage if a loss occurs on the thirty-first day.¹⁸¹ However, if the insurer can establish that the risk of hazard may have increased because of non-occupancy, coverage could potentially be excluded.¹⁸² The court also provided an excellent discussion of how an insurance company must act when it knows that a home is unoccupied and wishes to enforce the policy exclusion.¹⁸³

C. Court Refused to Find That Insurance Agency Owed Its Clients a Duty to Advise of the Amount of Homeowners' Insurance Coverage for Total Loss of Home

The decision in *Myers v. Yoder*¹⁸⁴ presents an interesting analysis of whether an insurance agent owed a duty to its insured in acquiring sufficient insurance coverage limits to replace a damaged home. The insureds contacted an insurance agent during the construction of their home, and the agent secured for the insureds a builders' risk insurance policy through an insurance company.¹⁸⁵ The amount of coverage was based upon what the insureds advised the agent would be the cost of the house after construction was completed.¹⁸⁶

After the house was complete, the agent performed a "replacement cost estimator" on the new home, which calculated what it would cost to replace their residence. A new homeowners' insurance policy was issued to the insureds for the estimated replacement amount.¹⁸⁷ Over the years, the policy was renewed by the insureds with only slight increases in the amount of the replacement coverage limits.¹⁸⁸

Later, the insureds' original agent left the insurance industry, and his former assistant became their insurance agent with a different agency.¹⁸⁹ The new agent arranged for replacement of their insurance policy with a different insurer, with only a slight increase in the policy limits.¹⁹⁰ In writing the new insurance policy, this agent did not perform a "replacement cost estimator" on the insureds' home.¹⁹¹ The insureds recalled having only one conversation with the new agent in the solicitation of their business and claimed that they requested "full

181. *Id.* at 908-09.

182. *Id.* at 909.

183. *See id.* at 907-08.

184. 921 N.E.2d 880 (Ind. Ct. App. 2010).

185. *Id.* at 882.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 883.

coverage” on their house.¹⁹² The policy was later renewed with the new insurance company, with only a slight increase in the policy limits.¹⁹³

At some later point, the insureds hired a contractor to dig a trench on their property.¹⁹⁴ The contractor accidentally struck a propane line, which caused gas to leak into the insureds’ home.¹⁹⁵ Unfortunately, the insureds’ property was destroyed when the gas exploded.¹⁹⁶ The insureds submitted a claim to their insurance company for the replacement value of their home.¹⁹⁷ At that time, they learned that the cost to replace their home exceeded the extent of the policy’s replacement costs limits by almost \$100,000.¹⁹⁸ As a result, the insureds filed a complaint against the insurance agency and insurance agent for negligence.¹⁹⁹

At the trial court level, the insurance agency defendants filed a motion for summary judgment, contending that as a matter of law, they did not owe the insureds a “duty to advise them as to the amount [of insurance coverage] for which they should insure their house.”²⁰⁰ They contended that only a “standard relationship” of agent and insured existed, but not a “special relationship” needed to impute a duty to the insurers to advise the insureds of the appropriate amount of coverage.²⁰¹ The trial court granted summary judgment for the insurance agency, finding specifically that there was “not an intimate, long-term relationship that would be required to create a duty to advise . . . [the insureds] in regards to the amount of insurance” they ought to maintain.²⁰²

On appeal, the court first observed that an insurance agent who agrees to acquire insurance for another owes that individual “a general duty to exercise reasonable care, skill and good faith diligence in obtaining the insurance.”²⁰³ However, Indiana law provides that the agent’s duty “does not extend to providing advice to the insured unless the insured can establish the existence of an intimate, long-term relationship with the agent or some other special circumstance.”²⁰⁴ The court identified certain factors that could demonstrate the existence of this “special relationship” between the agent and insured, which included whether the agent: “(1) exercised broad discretion in servicing the insured’s needs; (2) counseled the insured concerning specialized insurance coverage; (3) held himself out as a highly-skilled insurance expert; or (4)

192. *Id.* at 882.

193. *Id.*

194. *Id.* at 883.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* The insureds also sued the contractor who dug the ditch for negligently causing the gas explosion.

200. *Id.*

201. *Id.*

202. *Id.* at 884.

203. *Id.* at 885 (citations omitted).

204. *Id.* (citation omitted).

received compensation for the expert advice provided above the customary premium paid.”²⁰⁵

In this particular case, the appellate court determined that “no intimate, long-term relationship . . . existed” that could justify imposing the higher duty on the insurance agency.²⁰⁶ The court also rejected the insureds’ expectation of receiving “full coverage” as sufficient to impose a duty on an agent to advise concerning the proper amount of insurance coverage.²⁰⁷ As a result, the court determined that the insurance agency lacked any duty upon which the insureds could seek to recover against the insurance agency for their uninsured exposure.²⁰⁸

This case provides an excellent example of how insureds must pay attention to the declaration pages and premium notices for their policies to determine whether they are sufficiently insured. To the extent that there are any questions regarding that coverage, an insured must take steps to make sure that sufficient coverage is in place by establishing a “special relationship” with the insurer or agent or following up to make sure sufficient coverage exists.

IV. ENVIRONMENTAL COVERAGE CASES

During this survey period, the courts addressed a number of complex environmental coverage decisions. Because of the specialized nature of environmental insurance coverage practice and the fact-sensitive nature of each of these cases, this Article will not address those cases in great detail. However, the specific cases and a brief summary of the issues contained within them are mentioned below:

A. Cinergy Corp. v. St. Paul Surplus Lines Insurance Co.²⁰⁹

- An insured power company’s surrender of emission rights under the Clean Air Act²¹⁰ did not constitute an “occurrence” to trigger a coverage obligation.²¹¹
- Costs—including attorney fees and civil penalties—imposed by the federal government against the insured power company did not demonstrate an “occurrence” to trigger coverage under liability policies.²¹²

205. *Id.* (citing *Court View Centre, LLC v. Witt*, 753 N.E.2d 75, 87 (Ind. Ct. App. 2001)).

206. *Id.*

207. *Id.* at 889 (citing *Barnes v. McCarty*, 893 N.E.2d 325, 329 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1231 (Ind. 2008) (refusing to find that an insured’s request for “full [insurance] coverage” was sufficient to create an insurance agent duty upon which a negligence action could be pursued)).

208. *Id.* at 887.

209. 915 N.E.2d 524 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 797 (Ind. 2010).

210. 42 U.S.C. §§ 7401-7671 (2006 & Supp. 2009).

211. *Cinergy Corp.*, 915 N.E.2d at 534.

212. *Id.* at 534-35.

*B. Indiana Farmers Mutual Insurance Co. v. North Vernon Drop Forge, Inc.*²¹³

- A complaint filed by a recipient of contaminated fill dirt from an insured presented sufficient allegations to demonstrate an “occurrence” under the insured’s liability policy, implicating the insurance company’s duty to defend.²¹⁴
- The insurance policy’s intentional acts exclusion did not exclude coverage for the insured’s dumping of contaminated dirt.²¹⁵
- The fact that the insured supplied late notice of the claim to the insurance company did not result in prejudice to the insurer.²¹⁶

*C. Pulse Engineering, Inc. v. Travelers Indemnity Co.*²¹⁷

- This case presented an analysis of the appropriate choice of law question in determining which state’s law would apply to coverage for an environmental contamination claim.²¹⁸

*D. P.R. Mallory & Co. v. American Casualty Co.*²¹⁹

- Insureds who possessed knowledge of facts demonstrating an “occurrence” but delayed notifying their insurers of the occurrence were found to have provided unreasonably late notice.²²⁰
- The insureds’ unreasonable delay in notifying their insurance companies of environmental claims resulted in presumed prejudice to the insurers.²²¹

*E. West Bend Mutual Insurance Co. v. United States Fidelity
& Guaranty Co.*²²²

- A dispute between multiple insurance companies as to obligations to defend a mutual insured resulted in the court determining that one insurer’s “pollution exclusion” was sufficient to exclude coverage for a gasoline spill at insured’s premises under Indiana law.²²³

213. 917 N.E.2d 1258 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 796 (Ind. 2010).

214. *Id.* at 1263.

215. *Id.* at 1273.

216. *Id.* at 1276.

217. 679 F. Supp. 2d 969 (S.D. Ind. 2009).

218. *Id.* at 972-74.

219. 920 N.E.2d 736 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 795 (Ind. 2010).

220. *Id.* at 753.

221. *Id.* at 746.

222. 598 F.3d 918 (7th Cir. 2010).

223. *Id.* at 926.

DEVELOPMENTS IN INTELLECTUAL PROPERTY LAW

CHRISTOPHER A. BROWN*

Over the survey period, cases have come down which are both high-profile and of practical value to Indiana legal practitioners and those concerned with technology development. A summary and analytical review of these developments is provided, which will assist lawyers, inventors, technology managers, and others concerned with protection of intellectual property.

I. WHAT IS POTENTIALLY PATENTABLE: *BILSKI*

The most anticipated and awaited ruling for patent practitioners during the survey period was one of the last opinions issued by the U.S. Supreme Court in its 2009 term. In *Bilski v. Kappos*,¹ the Court faced squarely the issue of what types of subject matter were appropriate for consideration for a patent grant. In cases where the inventive “stuff” is a product, machine, or composition of matter, that question practically never arises.² Those types of matter are usually particularized to a specific use or structure, and so are easily considered in terms of the range of items they encompass. Such subject matter generally straightforwardly passes the initial test of whether to consider it and moves on to the substantive questions of whether it is new, useful and unobvious in view of the prior art.

Many methods or processes are likewise plainly within the subject matter appropriate for consideration for patent protection. Methods of making or using a product—or a method of using a machine, for example—are unquestionably suitable for a patent application.³ However, the statute provides only that a “process” may be considered for protection, and inventors have attempted to obtain protection for processes that are less connected or unconnected to particular structures or actions. Supreme Court precedent identifies exceptions to the broad consideration of anything that might be termed a “method.”⁴ Regardless of the broad nature of what can be patented under the statute, one cannot patent “laws of nature, physical phenomena, and abstract ideas,”⁵ exceptions that “have defined the reach of the statute as a matter of statutory *stare*

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1. 130 S. Ct. 3218 (2010).

2. “Whoever invents or discovers any new and useful *process, machine, manufacture, or composition of matter*, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.” 35 U.S.C. § 101 (2006) (emphasis added). “In choosing such expansive terms [as processes, machines, manufactures and compositions of matter] . . . modified by the comprehensive ‘any,’ Congress plainly contemplated that the patent laws would be given wide scope.” *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980).

3. See 35 U.S.C. § 100.

4. *Bilski*, 130 S. Ct. at 3225.

5. *Id.* (quoting *Chakrabarty*, 447 U.S. at 309).

decisis going back 150 years.”⁶

The patent application filed by inventors Bernard Bilski and Rand Warsaw brought the conflict between a broad sweep of potentially patentable subject matter and the established view that abstract ideas should be free to all to a head. The subject matter of the Bilski patent application was a method of hedging risk in commodity transactions, and the author discussed development of the application through the Patent and Trademark Office (PTO) and the appellate process in a previous article.⁷ To summarize, the Federal Circuit Court of Appeals distilled a test for determining whether a process is appropriate subject matter for patent consideration: it must be “tied to a particular machine or apparatus” or must “transform[] a particular article into a different state or thing.”⁸ Applying that test, the court determined that the inventors’ claimed processes were not patentable because they fit neither prong of the test.⁹ The terms of the involved claims did not include a particular machine, and the court saw the claimed processes as not operating on any articles, but merely concerned obligations or risk. The court left open the question of whether an operation on data (i.e., the electrons or “1s” and “0s” that form electronic data storage) would qualify, but such was not the situation in the Bilski application.¹⁰

The Supreme Court granted certiorari prior to the survey period and heard arguments on November 9, 2009. As previously noted, practically the entire Court term passed before its opinion was rendered in late June 2010. That opinion, while rejecting the Federal Circuit’s bright-line “machine-or-transformation” test, nonetheless affirmed the result that the process claims at issue were not eligible for patent consideration.¹¹

After reviewing the statute and the exceptions as noted above, the Court specifically noted that the question presented was merely a “threshold test” for claimed subject matter.¹² Whether it is clear or not that subject matter is a proper “product” or “process” for patent consideration, once that determination is made, the claims must still pass the substantive patentability requirements contained in the statute, such as novelty,¹³ non-obviousness,¹⁴ and proper disclosure.¹⁵ In the author’s view, this language at the front of the opinion informs and colors the remainder of the Court’s opinion. As the Court discusses what the proper analytical considerations are for determining whether the threshold test is met, the opinion has in the back of its mind that regardless of the outcome on that

6. *Id.* (citing *Le Roy v. Tatham*, 55 U.S. (1 How.) 156, 174-75 (1852)).

7. Christopher A. Brown, *Developments in Intellectual Property Law*, 43 IND. L. REV. 837, 837-44 (2010).

8. *In re Bilski*, 545 F.3d 943, 954 (Fed. Cir. 2008); see also Brown, *supra* note 7, at 839.

9. *Bilski*, 545 F.3d at 963.

10. *Id.*

11. *Bilski*, 130 S. Ct. at 3226, 3231.

12. *Id.* at 3225.

13. 35 U.S.C. § 102 (2006).

14. *Id.* § 103.

15. *Id.* § 112.

question, there are still the weighty questions of substantive patentability the claims must overcome. Thus, even if a decision to allow a process claim to proceed through the PTO is incorrect, there are other conditions that may prevent issuance of that claim in a patent.

The Court rejected two theories it called “categorical limitations” on what is an appropriate process for patent consideration.¹⁶ Turning first to the Federal Circuit’s machine-or-transformation test, the Court found that the test contravened its statements on statutory interpretation. Noting particularly that its own case law interpreting terms in the Patent Act does not “give[] the [j]udiciary *carte blanche* to impose other limitations that are inconsistent with the text and the statute’s purpose and design,”¹⁷ the Court saw no common or ordinary meaning of “process” that would invoke the machine-or-transformation test.¹⁸ Reviewing the precedent that led the Federal Circuit to its test, the Court took instead the view that the connection of a process to a machine or transformation “is a useful and important clue, an investigative tool” for the question of whether the process is eligible for consideration, but it is not the sole test.¹⁹ The Court reflected further on that view, saying that such machine-or-transformation connections may have previously been important in the analysis based on the technological developments under consideration in the nineteenth and most of the twentieth centuries. However, application of such a test in emerging technologies may “risk obscuring the larger object of securing patents for valuable inventions without transgressing the public domain,” and so “new technologies may call for new inquiries.”²⁰ Whether a process can qualify for patent protection should not, in the Court’s analysis, be necessarily determined by considerations that have been useful in the past.

The second theory proposed to limit the scope of proper “processes” under the statute was to eliminate protection for business methods. The Court also rejected this theory, saying that “at least as a textual matter,” the statutory term “process” can include business methods.²¹ Beyond the direct text of Section 101, the Court noted other portions of the statute that “explicitly contemplate[] the existence of . . . business method patents.”²² Denying the eligibility of business methods for patent protection would abrogate such statutory provisions. A limiting principle that tied unpatentable business methods to abstract ideas might be useful and harmonious with precedent, and “special problems” that might arise in considering such claims can be dealt with via appropriate application of novelty, non-obviousness and other substantive requirements for patent

16. *Bilski*, 130 S. Ct. at 3225-28.

17. *Id.* at 3226.

18. *Id.* at 3226-27.

19. *Id.* at 3227.

20. *Id.* at 3227-28.

21. *Id.* at 3228 (“The Court is unaware of any argument that the ‘ordinary, contemporary, common meaning’ . . . of ‘method’ excludes business methods.” (internal citation omitted)).

22. *Id.* (citing 35 U.S.C. § 273(a)(3) (2006) (providing a “prior use” defense to infringement allegations involving “a method of doing or conducting business”)).

protection.²³ Beyond that, business methods are considerable for patent protection along with other types of methods.

Thus, the Court dispensed with the Federal Circuit's machine-or-transformation test as well as the suggestion that business methods should not be eligible *ab initio*. What was left was the broad interpretation of "process" from the statute, the exceptions stated by the Court and noted above, and the precedent²⁴ which the Federal Circuit attempted to distill into a black-letter test. Taking these items in hand, the Court analyzed the claims at issue and determined that they do not express a proper "process" under the statute.²⁵ The risk-hedging identified in one claim is a concept well-known to commercial enterprise, and the formula of a dependent claim is merely an algorithm or abstract idea.²⁶ Other claims limit these ideas to particular markets, which the Court characterized as "adding token postsolution components" that do not result in eligible subject matter.²⁷

The *Bilski* opinion is disappointing to those who would prefer more certainty in this area of patent law. A bright-line test that even the Court itself noted is useful in many cases and in many technological areas was rejected. Further, while noting some of the difficulties in analyzing business methods, they remain eligible in the broad sense for patent protection. They must be analyzed case-by-case to determine whether they are merely abstract ideas or another exception to the general eligibility of methods. The law is essentially back to its state prior to the Federal Circuit's *Bilski* opinion, requiring the PTO and courts to review process claims carefully to see whether they are nothing more than laws of nature, physical phenomena, or abstract ideas. If there is something more than just such a law, phenomenon or idea, and that "something" is more than a mere application to a particular field or other "token postsolution activity," then the rest of the requirements for a patent can be reached.

For those that prefer a more fluid environment for considering patentability issues, the Court's opinion is clearly more palatable than the Federal Circuit's test. However, the Court has not given a blanket approval to consideration of all methods. The existing exceptions, noted above, are to be considered, and the Court appeared perfectly happy to accept evidence of a method meeting the machine-or-transformation test to indicate potential eligibility for a patent. It simply rejected the idea that this test is the only test to be considered. It is likely that the test will remain an important (if not *the* most important) criterion for determining whether a process claim is proper for consideration. Nonetheless,

23. *Id.* at 3229.

24. These precedential decisions include *Diamond v. Diehr*, 450 U.S. 175 (1981), *Parker v. Flook*, 437 U.S. 584 (1978), and *Gottschalk v. Benson*, 409 U.S. 63 (1972), all of which are referred to in the respective *Bilski* decisions of the Supreme Court and the Federal Circuit. *Bilski*, 130 S. Ct. at 3229-31; *In re Bilski*, 545 F.3d 943, 952-56 (Fed. Cir. 2008); see also Brown, *supra* note 7, at 839-40.

25. *Bilski*, 130 S. Ct. at 3231.

26. *Id.*

27. *Id.* (citing *Flook*, 473 U.S. at 590).

creative arguments for eligibility of a process that do not rely merely on a machine or the transformation of an article are permissible, and they may begin a transformation of Patent and Trademark Office (PTO) and judicial views on the subject.

II. DUTY OF CANDOR TO THE PTO: *THERASENSE*

Another important patent case for Indiana practitioners and corporate employees or officers involved in obtaining patents is *Therasense, Inc. v. Becton, Dickinson & Co.*²⁸ In *Therasense*, the Federal Circuit reviewed a lower court decision finding a patent unenforceable for inequitable conduct in procuring the patent.²⁹

The technology in question in *Therasense* concerned blood glucose testing for use by those suffering from diabetes or those involved in their care.³⁰ Therasense had accused Becton Dickinson and Company (“Becton”) of infringement of several patents via sales of the latter’s glucose test strip. Following a summary judgment relating to some of the claims, the district court conducted a bench trial on the rest. Out of the bench trial came a ruling that one of the patents was not enforceable because of inequitable conduct in failing to disclose material statements made during a proceeding in the European Patent Office (EPO) concerning a counterpart patent.³¹

On appeal, the Federal Circuit took pains to observe that the standard for a finding of inequitable conduct must remain high in view of the severe penalty of rendering an entire patent unenforceable.³² In the court’s words, the inequity is comparable between one who obtains a patent “through deliberate misrepresentations or omissions of material information . . . [and] to strike down an entire patent where the patentee only committed minor missteps or acted with minimal culpability or in good faith.”³³ Having briefly noted the requirements for at least a threshold level of materiality of a misrepresentation or omission and intent to mislead on the part of the relevant person, the court considered this matter to be “one of those rare cases in which a finding of inequitable conduct is appropriate, particularly in light of the critical nature of the representations to the PTO in securing allowance” of the patent in question.³⁴

The ruling arose out of inconsistencies between information given to the PTO to secure the patent in question and information given to the EPO regarding a

28. 593 F.3d 1289 (Fed. Cir.), *reh’g en banc granted, opinion vacated*, Nos. 2008-1511 to -14 and 2008-1595, 2010 WL 1655391 (Fed. Cir. Apr. 26, 2010), *reinstated in part* by Nos. 2008-1511 to -14 and 2008-1595, 2011 WL 2028255 (Fed. Cir. May 25, 2011).

29. *Id.* at 1291.

30. *Id.* at 1293.

31. *Id.*

32. *Id.* at 1300.

33. *Id.* (quoting *Star Scientific, Inc. v. R.J. Reynolds Tobacco Co.*, 537 F.3d 1357, 1366 (Fed. Cir. 2008)).

34. *Id.*

counterpart patent.³⁵ Before the PTO, the attorney prosecuting the patent and his client's director of research and development discussed strategies for obtaining protection after years of rejections. The result was a series of claims to a sensor that did not require a protective membrane, coupled with arguments to the examiner that references required a membrane in the particular environment of interest.³⁶ The director of research and development provided a declaration asserting that one of ordinary skill would understand that such a membrane would have been necessary according to the state of knowledge at the effective filing date of the application. The attorney followed up with statements in the record relying on the director's declaration and asserting that the optional membrane of his claims was not shown or suggested in the prior art. He further argued that the person of ordinary skill would understand the language "optionally, but preferably" in the claims to be "mere patent phraseology" rather than as a "technical teaching."³⁷ After those filings, the PTO allowed the claims.³⁸

In the EPO, the patentee's patent with a "virtually identical specification[]" was revoked over a reference that the patentee had tried to distinguish.³⁹ In the revocation proceeding, the reference showed a semipermeable membrane with a glucose sensor, and the patentee's counsel took the position that its optional membrane had a particular use (to trap or block coarse particles during use) and that the language was technologically quite clear. These statements were not provided to the PTO for consideration during the examination of the counterpart U.S. application. The district court found that these statements to the EPO directly contradicted statements to the PTO in the counterpart application in two particular ways.⁴⁰ First, the statements to the EPO gave a "clear" meaning for the "optionally" language, while the arguments to the PTO called that language mere "patent phraseology."⁴¹ Second, the documents provided in the EPO revocation proceeding tended to show that a membrane was not necessary for testing in the environment considered in the PTO examination.⁴²

The Federal Circuit agreed that the statements made to the EPO contradicted those made to the PTO.⁴³ In doing so, it distinguished the case of *Scanner Technologies Corp. v. ICOS Vision Systems Corp.*⁴⁴ Where the *Scanner Technologies* case considered that a number of inferences could reasonably be drawn from the patentee's representations and at least one was favorable to the patentee,⁴⁵ the present case in the majority's view included direct inconsistencies

35. *Id.* at 1301-03.

36. *Id.* at 1301.

37. *Id.* at 1301-02 (emphasis removed).

38. *Id.* at 1302.

39. *Id.*

40. *Id.* at 1303.

41. *Id.*

42. *Id.*

43. *Id.* at 1303-04.

44. 528 F.3d 1365 (Fed. Cir. 2008).

45. *Id.* at 1376.

in the positions taken before the PTO and EPO on the same subject.⁴⁶ In that context, the lack of disclosure of the EPO statements to the PTO was clearly a material omission, so much so that a contrary conclusion would “eviscerate the duty of disclosure”⁴⁷ placed on attorneys and others involved in patent prosecution.⁴⁸ While courts have considered mere attorney argument not to be binding in and of itself, the Federal Circuit in this case noted that such cases have not addressed the relevant context where argument respecting one application has contradicted argument in a related or counterpart application or patent and was withheld from the PTO. The fact that some of the information provided to the PTO was in evidentiary form, like an affidavit or declaration, further distinguished this case from those earlier cases that dealt only with attorney argument.⁴⁹

Turning to the intent prong of the analysis, the court examined five findings made by the district court:

(1) that the statements made to the PTO concerning the prior art . . . were absolutely critical in overcoming the examiner’s earlier rejections of the [patentee’s] claims . . . (2) that the EPO statements would have been very important to an examiner because they contradicted the representations made to the PTO; (3) that [the attorney and the director of research and development] . . . both knew of the EPO statements and consciously withheld them from the PTO; (4) that neither . . . provided a credible explanation for failing to submit the EPO documents to the PTO; and (5) that [their] . . . explanations for withholding the EPO documents were so incredible that they suggested intent to deceive.⁵⁰

Items one through three were either undisputed or were supported by evidence, and items four and five depended on witness credibility and thus were essentially unreviewable. The court also rejected the argument on appeal that the director of research and development lacked intent to deceive the PTO by providing the information submitted to the EPO to the attorney prosecuting the U.S. application. The court explained that “[t]his court has in the past expected more of declarants before the PTO [I]t was [the director’s] duty to avoid intentional deception in his declaration before the PTO, and merely disclosing the EPO documents to [the attorney] . . . did not obviate that duty.”⁵¹

Perhaps the first lesson to be drawn from *Therasense* comes from the signals within the opinion that inequitable conduct should be a rare incident. For many years now, the Federal Circuit has indicated that unjustified allegations of

46. *Therasense*, 593 F.3d at 1304.

47. *Id.* at 1305.

48. See 37 C.F.R. § 1.56 (2011). Where there is a question as to whether information is material, “a patent application should err on the side of disclosure.” *LNP Eng’g Plastics, Inc. v. Miller Waste Mills, Inc.*, 275 F.3d 1347, 1361 (Fed. Cir. 2001).

49. *Therasense*, 593 F.3d at 1305.

50. *Id.* at 1306.

51. *Id.* at 1307-08.

inequitable conduct are a “plague” on patent litigation,⁵² attempting to elevate to a destroying level errors or good faith judgments that were in fact incorrect. Case law has tried to ameliorate that trend by requiring a standard of pleading for inequitable conduct similar or identical to that for fraud under the Federal Rules of Civil Procedure.⁵³ The *Therasense* court makes it very plain that findings of inequitable conduct should be an unusual incident, for those cases (like *Therasense*) in which apparent evidence of contradictory statements or other misrepresentations or omissions vital to the examination of the patented subject matter is available. Its language comparing the inequity in an inappropriate finding of unenforceability to that of obtaining patent rights through material misrepresentation or omission is a strong hint from the Federal Circuit to the district courts that assertions of inequitable conduct must be closely scrutinized and rarely accepted. Errors or good-faith, reasonable decisions are not “inequitable conduct”; that label and its consequences must be reserved for deliberate misrepresentations or similar activity.

Therasense also reminds the patent practitioner that it is not only the attorney or agent prosecuting an application, but also others involved in the patenting process. The rules of practice in patent cases provide that

Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the [PTO] . . . which includes a duty to disclose to the . . . [PTO] all information known to that individual to be material to patentability Individuals associated with the filing or prosecution of a patent application within the meaning of this section are: (1) Each inventor named in the application; (2) Each attorney or agent who prepares or prosecutes the application; and (3) Every other person who is substantively involved in the preparation or prosecution of the application and who is associated with the inventor, with the assignee or with anyone to whom there is an obligation to assign the application.⁵⁴

The first two categories of “associated individuals” are not surprising and are generally not difficult to handle. The attorney should know his or her duties, and in his or her contact with the inventors in preparing and prosecuting the application can request material information from the inventors and advise them regarding their duty of disclosure. The last category is frequently more difficult to address, at least insofar as the attorney may not know immediately what “other” persons may be substantively involved with the preparation or prosecution of the application. The director of research and development who prepared a declaration in the *Therasense* case is very clearly someone in the third category, and his duty of candor is separate from that of the attorney in the case.

52. See, e.g., *Molins PLC v. Textron Inc.*, 48 F.3d 1172, 1182 (Fed. Cir. 1995); *Burlington Indus., Inc. v. Dayco Corp.*, 849 F.2d 1418, 1422 (Fed. Cir. 1988).

53. See, e.g., *Pressure Prods. Med. Supplies Inc. v. Greatbatch Ltd.*, 599 F.3d 1308, 1320 (Fed. Cir. 2010).

54. 37 C.F.R. §§ 1.56(a), (c) (2011).

The *Therasense* opinion provides, in the author's view, a glimpse into the current views of the Federal Circuit regarding treatment of inequitable conduct questions. To that extent, it is an important case following on from opinions such as *McKesson Information Solutions, Inc. v. Bridge Medical, Inc.*⁵⁵ and should be reviewed. Nevertheless, the Federal Circuit vacated the *Therasense* opinion on April 26, 2010 as part of its order granting rehearing en banc.⁵⁶ The order provided that the appeal would be decided based on prior briefing as well as new briefing dedicated to the following questions:

1. Should the materiality-intent-balancing framework for inequitable conduct be modified or replaced?
2. If so, how? In particular, should the standard be tied directly to fraud or unclean hands? If so, what is the appropriate standard for fraud or unclean hands?
3. What is the proper standard for materiality? What role should the United States Patent and Trademark Office's rules play in defining materiality? Should a finding of materiality require that but for the alleged misconduct, one or more claims would not have issued?
4. Under what circumstances is it proper to infer intent from materiality?
5. Should the balancing inquiry (balancing materiality and intent) be abandoned?
6. Whether the standards for materiality and intent in other federal agency contexts or at common law shed light on the appropriate standards to be applied in the patent context.⁵⁷

As these questions demonstrate, fundamental premises involved in the treatment of inequitable conduct or "fraud on the PTO" are being put forward for discussion. It may be that the Federal Circuit wishes to have an en banc opportunity to solidify prior inequitable conduct law. It may also be the case that the court views this case as an opportunity to renovate the law in this area. The facts of the *Therasense* case, at least if one agrees with the findings of the district court and the panel majority at the Federal Circuit, would appear not to favor a basic reworking of principles of inequitable conduct. After all, filing statements in one patent office that are contradictory to those filed in the PTO would seem to be very much what the law of inequitable conduct is designed to deter, regardless of how one formulates the principles. Certainly the en banc treatment of this case was highly anticipated, and this author notes that it was issued in the summer of 2011.⁵⁸

55. 487 F.3d 897 (Fed. Cir. 2007).

56. *Therasense, Inc. v. Becton, Dickinson & Co.*, Nos. 2008-1511 to -14 and 2008-1595, 2010 WL 1655391 (Fed. Cir. Apr. 26, 2010).

57. *Id.* at *1 (internal citations omitted).

58. Nos. 2008-1511 to -14 and 2008-1595, 2011 WL 2028255 (Fed. Cir. May 25, 2011).

III. PATENT TERM ADJUSTMENTS: *WYETH*

In 1995, as part of the changes to patent practice involved in the Uruguay Round Agreements Act, the term of a United States patent was changed. Prior to the change, a patent's term was seventeen years from the date of issuance, assuming all maintenance fees were paid. The change gave patents having a filing date on or after June 8, 1995 a term of twenty years from the filing date.⁵⁹ To meet criticisms that the change shortened the term of patent that required more than three years for examination, term guarantees were enacted.⁶⁰ The guarantees provided for an extension of the patent term that would account for delays occasioned by the PTO during examination. In short, a patentee receives an extra day of patent term for each day of delay in responses from the PTO—for example, for a delay over fourteen months in providing a first action on the merits or over 4 months in responding to an applicant's filing or appeal⁶¹—and an extra day for each day over three years of total pendency of the application,⁶² but one does not double-count those totals.⁶³ Additional days for delay due to interference, secrecy orders, or appeals are also provided.⁶⁴ The patentee loses a day of those adjustments for each day of his or her delay beyond established response periods.⁶⁵ The PTO created a system for performing these calculations, provides to patentees a form announcing any such term extension, and prints the number of days of such extension on the face of the issued patent.

In *Wyeth v. Kappos*, that system for calculating extensions for delay in the PTO was under scrutiny, and the Federal Circuit decided that the PTO had been miscalculating term extension to the detriment of patentees.⁶⁶ The pharmaceutical giant Wyeth had received a patent and petitioned the PTO to reconsider the extension it had indicated on the patent.⁶⁷ When unsuccessful, Wyeth filed suit in the District of Columbia federal court, and the court vindicated its argument that the PTO had been undercalculating the extension.

On appeal, the Federal Circuit upheld the district court's decision.⁶⁸ In practice, the PTO had been calculating the extension due to response delay (the "A period") and the extension due to a total pendency over three years (the "B period") and awarding the larger of the two, asserting that by doing so, it accounted for any overlap between the periods.⁶⁹ The court, however, relied on the statutory language to note that "overlap" cannot happen "unless the violations

59. 35 U.S.C. § 154(a)(2) (2006).

60. *Id.* § 154(b)(1).

61. *Id.* § 154(b)(1)(A).

62. *Id.* § 154(b)(1)(B).

63. *Id.* § 154(b)(2)(A).

64. *Id.* § 154(b)(1)(C).

65. *Id.* § 154(b)(2)(C).

66. *Wyeth v. Kappos*, 591 F.3d 1364, 1372 (Fed. Cir. 2010).

67. *Id.* at 1368-69.

68. *Id.* at 1372.

69. *Id.* at 1368.

occur at the same time.”⁷⁰ That is, the PTO’s system did not accord with the statute because of its view that the B period

can occur *anytime* after the application is filed. To the contrary, the language of section 154(b) does not even permit B delay to start running until three years *after* the application is filed. . . . “The problem with the PTO’s interpretation is that it considers the application *delayed* under the [B guarantee] during the period before *it has delayed*.”⁷¹

The court provided additional bases for rejecting the PTO’s method of calculation in finding for Wyeth.

The result is that the calculation of patent term extension for delay in the PTO must start with the A period that exists prior to the date three years from the patent’s filing date. To that is added any B period for delay beyond that three-year-from-filing period, since those two periods cannot by definition overlap. Any additional response-related delay (A period) that occurs after the three-year-from-filing date would presumably overlap with the ongoing B period delay. Practitioners should accordingly bear in mind as they are reviewing patents for their clients that the extension indicated on the face of a patent may not be accurate.

IV. FALSE MARKING: *FOREST GROUP* AND *PEQUIGNOT*

The Federal Circuit also took a new view of the false marking statute in *Forest Group Inc. v. Bon Tool Co.*⁷² In a precedent-overturning case, the court put new teeth in the provision that deters placing an unmerited indication of patent protection on a product.⁷³

The Patent Act provides a remedy against one who

marks upon, or affixes to, or uses in advertising in connection with anything made, used, offered for sale, or sold by such person within the United States, or imported by the person into the United States, the name or any imitation of the name of the patentee, the patent number, or the words “patent,” “patentee,” or the like, with the intent of counterfeiting or imitating the mark of the patentee, or of deceiving the public and inducing them to believe that the thing was made, offered for sale, sold, or imported into the United States by or with the consent of the patentee; or

[w]hoever marks upon, or affixes to, or uses in advertising in connection with any unpatented article, the word “patent” or any word or number importing that the same is patented, for the purpose of deceiving the public; or

70. *Id.* at 1369.

71. *Id.* at 1370 (citation omitted).

72. 590 F.3d 1295 (Fed. Cir. 2009).

73. *Id.* at 1304-05.

[w]hoever marks upon, or affixes to, or uses in advertising in connection with any article, the words "patent applied for," "patent pending," or any word importing that an application for patent has been made, when no application for patent has been made, or if made, is not pending, for the purpose of deceiving the public⁷⁴

The guilty party is fined "not more than \$500 for every such offense,"⁷⁵ with half going to the one suing and half to the United States.⁷⁶ In *Forest Group*, the defendant had counterclaimed under this statute.⁷⁷ The district court found that the plaintiff had been falsely marking its products after a particular date and had been awarded \$500 for one offense.⁷⁸

The Federal Circuit found that the lower court's findings on the substance of the offense were not clearly erroneous, and the court allowed the offense to stand.⁷⁹ On the question of damages, the defendant argued that the potential \$500 penalty applied to each instance of false marking (i.e., each product), not to a single continuous false marking offense.⁸⁰ The Federal Circuit noted a past case that held that continuous false marking was a single offense,⁸¹ but it also noted that the statute involved in that case provided a \$100 *minimum* fine for false marking. The change from a minimum fine to a maximum fine as in the current statute occurred in 1952, but several later cases continued to levy a single-offense penalty for continuous false marking.⁸²

Overruling these later cases, the court found that they did not accord with the language of the statute. Instead, both the language and the policy behind the statute showed that the penalty should be levied on a per-article basis.⁸³ The policy reasoning provided by the court focused on the potential for false marking to drive competitors or innovators away from an unpatented product for fear they may trespass on patent rights. The court explained, "False marking can also cause unnecessary investment in design around or costs incurred to analyze the validity or enforceability of a patent whose number has been marked upon a product with which a competitor would like to compete."⁸⁴ With that per-article requirement, however, goes the discretion inherent in the maximum of the fine. A trial court may levy a fine appropriate to the particular case before it:

The statute provides a fine of "*not more than* \$500 for every such offense." By allowing a range of penalties, the statute provides district

74. 35 U.S.C. § 292(a) (2006).

75. *Id.*

76. *Id.* § 292(b).

77. *Forest Group*, 590 F.3d at 1299.

78. *Id.*

79. *Id.* at 1300.

80. *Id.* at 1301.

81. *Id.* (citing *London v. Everett H. Dunbar Corp.*, 179 F. 506 (1st Cir. 1910)).

82. *Id.* at 1302 (case citations omitted).

83. *Id.* at 1304.

84. *Id.* at 1303.

courts the discretion to strike a balance between encouraging enforcement of an important public policy and imposing disproportionately large penalties for small, inexpensive items produced in large quantities. In the case of inexpensive mass-produced articles, a court has the discretion to determine that a fraction of a penny per article is a proper penalty.⁸⁵

The Federal Circuit remanded the case to the district court for calculation of the appropriate fine for false marking.

Later during the survey period, the Federal Circuit addressed false marking again in *Pequignot v Solo Cup Co.*⁸⁶ In this case, the plaintiff had asserted that the defendant's plastic drink cup lids had been falsely marked with a patent number, and he claimed his half of a \$500-per-article fine.⁸⁷

The opinion discussed background facts at some length, which were plainly vital in its determination that no violation of the false marking statute had occurred. To summarize, Solo had been marking its patent numbers properly on its drink lids.⁸⁸ However, in 2000, it became aware that the patents had expired and that it was at that time marking drink cup lids with the numbers of those expired patents. Solo requested advice from outside counsel and created a policy based on that advice to replace molds as they wore out with new molds that left out the expired patent numbers.⁸⁹ Solo also took further steps to indicate that products "may be covered" by noted patents on the advice of counsel.⁹⁰ Under these facts, the district court found that Solo had rebutted the presumption of intent that arises from falsely marking with knowledge of the falsity.⁹¹ Without intent, there was no liability.

The Federal Circuit agreed. Turning first to the meaning in the statute of the term "unpatented article," the court sided with *Pequignot* in finding that an article once covered by a now-expired patent is an unpatented article, and continued placement of the expired patent number on such article is the sort of conduct that is contrary to Section 292.⁹² As with articles that have never been patented, they are in the public domain. Further, the policies standing behind Section 292 are equally applicable to both types of articles.⁹³ On that basis, the articles were

85. *Id.* at 1304.

86. 608 F.3d 1356 (Fed. Cir. 2010).

87. *Id.* at 1357-58. The court noted that half of the maximum fine would amount to about \$5.4 trillion, or more than 40% of the national debt. *Id.* at 1359 n.1.

88. *Id.* at 1358.

89. *Id.* at 1359. The court noted evidence in the record that suggested that such molds last for a considerable period before wearing out and that "wholesale replacement of the mold cavities would be costly and burdensome." *Id.*

90. *Id.*

91. *Id.* at 1360. The noted presumption came from the *Clontech* opinion. *Clontech Labs., Inc. v. Invitrogen Corp.*, 406 F.3d 347 (Fed. Cir. 2005).

92. *Pequignot*, 608 F.3d at 1361.

93. *Id.* at 1362.

falsely marked.

On the question of intent, the court began from the statutory language by noting that a violation of Section 292 requires actions “for the purpose of deceiving the public.”⁹⁴ Its review of prior cases led it to the same conclusion as Solo and the district court—that false marking and knowledge of falsity provide a rebuttable presumption of intent.⁹⁵ In fact, the court noted that the threshold for proving deceptive intent is high due to the criminal nature of Section 292: “mere knowledge that a marking is false is insufficient to prove intent if Solo can prove that it did not consciously desire the result that the public be deceived.”⁹⁶ Further, Solo put on an adequate rebuttal with its evidence of attempting to address the marking issue through seeking advice of counsel and putting that advice into practice. Perhaps more intriguing is the court’s blessing given to Solo’s statements with respect to its products that they “may be covered” by one or more of the listed patents. The court noted that that statement reflected the true situation and thus found it “highly questionable” whether the statement could have been intended to deceive the public.⁹⁷

Without any basis for liability, the Federal Circuit did not reach the question of a proper monetary remedy. It noted the *Forest Group* decision that every falsely marked product is an “offense” under the statute, so that the fine is calculated on a per-article basis.⁹⁸ One may, without too much concern for error, assume that a levy of \$500 per plastic drink cup lid would be unlikely and even unsupportable. The logic of the per-article levy is evident in the Solo situation nonetheless. The court will have discretion to take evidence as to what an appropriate per-article amount would be to deter inappropriate behavior, and/or to recompense a competitor or the general public from the intentional misunderstanding given by a violation of the false marking statute.

V. DIRECT AND INDIRECT TRADEMARK INFRINGEMENT ONLINE: *TIFFANY*

Although not a Seventh Circuit case, *Tiffany (NJ) Inc. v. eBay Inc.*⁹⁹ is quite instructive concerning trademark issues online and in the context of resale of goods. In addition, it is a good reminder that others may use one’s trademark so long as the use is in connection with the trademark owner’s goods or services.

As is well known, a variety of goods are bought and sold via the eBay service

94. *Id.* (citing 35 U.S.C. § 292(a) (2006)).

95. *Id.* at 1362-63. The court suggested that the presumption may be weaker in cases in which the only patent numbers marked on the article were those which had once covered the article. *Id.* at 1363.

96. *Id.*

97. *Id.* at 1365. Surprisingly, the court did not discuss at all the policy considerations noted above: that competitors must spend resources running down the listed patent numbers if they wish to compete. Another query is whether there is some possibility of a latent “deception” by hiding the “good” patent (the one that is in force and covers the product) among expired patent number(s).

98. *Id.* (citing *Forest Group, Inc. v. Bon Tool Co.*, 590 F.3d 1295 (Fed. Cir. 2009)).

99. 600 F.3d 93 (2d Cir. 2010).

in its function as an internet marketplace. As a part of the service, eBay has implemented steps to improve trust and find counterfeit products, including “buyer protection programs,” a “fraud engine,” a “notice-and-takedown” system called “VeRO” for rights-holders to report potentially infringing articles, and other efforts.¹⁰⁰ In promoting its service and attempting to improve its business, eBay also sought to publicize the sale of premium and branded jewelry. Among other efforts, it noted the presence of Tiffany merchandise on its site.¹⁰¹

Tiffany, the renowned seller of jewelry and other products, noticed that a substantial amount of the “Tiffany” merchandise available on eBay was counterfeit.¹⁰² Tiffany also noted the use by eBay of the Tiffany name in eBay’s efforts to drive traffic to its site. In response, Tiffany sued eBay on a number of trademark-related claims, including both direct and indirect infringement and false advertising. Following a bench trial, the district court found in eBay’s favor on all of the claims, and Tiffany appealed.¹⁰³

On the allegations of direct trademark infringement, the Second Circuit focused on the doctrine of “fair use” of a trademark, “which allows ‘[a] defendant [to] use a plaintiff’s trademark to identify the plaintiff’s goods so long as there is no likelihood of confusion about the source of [the] defendant’s product or the mark-holder’s sponsorship or affiliation.’”¹⁰⁴ The court gave three conditions arising from a Ninth Circuit Court of Appeals case for applying the doctrine: the product must be readily identifiable without using the mark; the minimum amount of the mark reasonably necessary to identify the product must be used; and the user cannot suggest sponsorship or endorsement by the mark’s owner.¹⁰⁵ Beyond these formulations, however,

[w]e have recognized that a defendant may lawfully use a plaintiff’s trademark where doing so is necessary to describe the plaintiff’s product and does not imply a false affiliation or endorsement by the plaintiff of the defendant. “While a trademark conveys an exclusive right to the use of a mark in commerce in the area reserved, that right generally does not prevent one who trades a branded product from accurately describing it by its brand name, so long as the trader does not create confusion by

100. *Id.* at 99.

101. *Id.*

102. *Id.* at 97. Tiffany’s proffered evidence purported to show that about three-quarters of the “Tiffany” items on eBay were counterfeit, but the district court indicated that such evidence was flawed. *Id.*

103. *Id.* at 101.

104. *Id.* at 102 (quoting *Merck & Co. v. Mediplan Health Consulting, Inc.*, 425 F. Supp. 2d 402, 413 (S.D.N.Y. 2006)). Fair use in the trademark context should not be confused with the standards and analysis involved in the copyright doctrine of fair use, codified at 17 U.S.C. § 107 (2006).

105. *Tiffany*, 600 F.3d at 102 (citing *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992)).

implying an affiliation with the owner of the product.”¹⁰⁶

In other words, where one uses another's mark to identify that other's goods, and does not suggest an affiliation or sponsorship by that other of the usage, the usage is permissible.

The district court found that eBay's uses of the “Tiffany” name was used accurately to describe actual Tiffany goods that sellers were offering on its service.¹⁰⁷ The Second Circuit agreed that eBay's usage did not imply some sponsorship of its efforts by Tiffany and that Tiffany itself had a presence on eBay that advised that counterfeit material was available on eBay.¹⁰⁸ The implicit result is that there was no public confusion or deception that arose from eBay's particular usage of the Tiffany name.

Turning to indirect infringement, the court considered whether eBay had liability for “facilitating the infringing conduct” of vendors on its site that sold counterfeit Tiffany goods.¹⁰⁹ However, the principles of such indirect trademark infringement are not well-defined and have arisen out of the use of general common law concepts of vicarious liability in other tort contexts. The principal case from which the *Tiffany* opinion drew was *Inwood Laboratories Inc. v. Ives Laboratories, Inc.*,¹¹⁰ which has also been applied by other circuits.¹¹¹ *Inwood* provided liability for one who “intentionally induces another to infringe a trademark,” or for one who continues to provide a product to another whom it knows is infringing a trademark.¹¹²

For this panel of the Second Circuit, the question devolved to whether eBay met either prong of the *Inwood* formulation.¹¹³ As to the intentional inducement prong, the district court found (and the Second Circuit agreed) that eBay's takedown provisions eliminated liability for any sales of such sellers.¹¹⁴ That is, where Tiffany had objected to a particular listing, eBay removed it from the site, warned buyers and sellers, and took additional steps. These steps to halt challenged listings were enough to show that eBay did not induce others to make infringing uses or transactions.

On the second prong, however, Tiffany maintained that eBay had more than enough knowledge of counterfeit Tiffany goods, through Tiffany's own notifications to eBay, to find eBay liable under *Inwood*.¹¹⁵ Both the district court

106. *Id.* at 102-03 (citing *Dow Jones & Co. v. Int'l Sec. Exch., Inc.*, 451 F.3d 295, 308 (2d Cir. 2006)).

107. *Id.* at 103.

108. *Id.*

109. *Id.*

110. 456 U.S. 844 (1982).

111. *See, e.g.*, *Hard Rock Café Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1148 (7th Cir. 1992).

112. *Tiffany*, 600 F.3d at 104 (quoting *Inwood*, 456 U.S. at 854).

113. *Id.* at 106.

114. *Id.*

115. *Id.* at 107.

and the Second Circuit disagreed. The generalized knowledge that some counterfeit goods might be present is insufficient. Rather, for service providers such as eBay, “[s]ome contemporary knowledge of which particular listings are infringing or will infringe in the future is necessary.”¹¹⁶ Notably, the Second Circuit looked to a copyright case, *Sony Corp. of America v. Universal City Studios, Inc.*,¹¹⁷ to interpret the level of knowledge *Inwood* required for vicarious liability.¹¹⁸ Thus, Tiffany’s specific identification of alleged counterfeit goods was addressed quickly through eBay’s procedures, and its general accusation of the existence of other counterfeit goods did not suffice “to demonstrate that eBay was supplying its service to individuals who it knew or had reason to know were selling counterfeit Tiffany goods.”¹¹⁹

This case, as perhaps the first case squarely addressing these trademark issues for an online sales forum, will be of substantial interest to others selling e-tail goods. The opinion spells out in some detail the efforts eBay made to confront counterfeit goods, while recognizing that it could not as a practical matter guarantee that no such goods would find their way to its marketplace. Others involved in this type of business will do well to review eBay’s efforts. Immediately handling complaints from trademark or other intellectual property holders according to established policy will go some distance toward ensuring that one is free from potential direct or vicarious infringement liability. On the plaintiff’s side, *Tiffany* makes very clear the type of information a sales facilitator must have in order to face the possibility of indirect infringement. The result in *Tiffany* is consistent with the general policy that a trademark owner is responsible for policing his or her mark. If the service provider does not act on reasonably specific allegations, then the provider may be on the hook. But if it does, then the mark owner must seek for the actual infringer for redress.

116. *Id.*

117. 464 U.S. 417 (1984).

118. *Tiffany*, 600 F.3d at 108.

119. *Id.* at 109. The result under Seventh Circuit law, following the reasoning of *Hard Rock Café Licensing Corp. v. Concession Services, Inc.*, 955 F.2d 1143 (7th Cir. 1992), would appear to be the same. Both *Hard Rock* and *Tiffany* follow the *Inwood* formulation as interpreted by *Sony*. The facts in *Hard Rock* are somewhat less favorable to the alleged infringement facilitator, insofar as the defendant was not as active as eBay in addressing counterfeit goods. *See id.* at 1146-47. The result in *Hard Rock* was that the defendant *could* be liable, but the showing made by the plaintiff was not sufficient to impose liability under *Inwood*. *Id.* at 1149.

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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INTRODUCTION

The 2010 survey period¹ was another active one for Indiana practitioners and judges. As in previous years, this Survey presents both current and recent cases and relevant commentary about them in context by following the basic structure of the Indiana Product Liability Act (IPLA).² This Survey does not attempt to address in detail all of the cases decided during the survey period that involve product liability issues.³ Rather, it examines selected cases that discuss the more important substantive concepts.

I. THE SCOPE OF THE IPLA

The IPLA, Indiana Code sections 34-20-1-1 to -9-1, governs and controls all actions that are brought by users or consumers against manufacturers or sellers for physical harm caused by a product, “regardless of the substantive legal theory or theories upon which the action is brought.”⁴ When Indiana Code sections 34-

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1. The survey period is October 1, 2009 to September 30, 2010.

2. IND. CODE §§ 34-20-1-1 to 9-1 (2011). This Article follows the lead of the Indiana General Assembly and employs the term “product liability” (not “products liability”) when referring to actions governed by the IPLA.

3. Courts issued several important opinions in cases in which the theory of recovery was related to or in some way based upon “product liability” principles, but the appellate issue did not involve a question implicating substantive Indiana product liability law. This Article does not address those decisions in detail because of space constraints, even though they may be interesting to Indiana product liability practitioners. *See generally* Kucik v. Yamaha Motor Corp., No. 2:08-CV-161-75, 2009 WL 5200537 (N.D. Ind. Dec. 23, 2009) (addressing spoliation claim in product liability case); Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722 (Ind. 2010) (applying economic loss doctrine to services as well as products); White-Rodgers v. Kindle, 925 N.E.2d 406 (Ind. Ct. App. 2010) (addressing discovery of expert materials in product liability case).

4. IND. CODE § 34-20-1-1(3).

20-1-1 and -2-1 are read together, there are five unmistakable threshold requirements for IPLA liability: (1) a claimant who is a user or consumer and is also "in the class of persons that the seller should reasonably foresee as being subject to the harm caused";⁵ (2) a defendant that is a manufacturer or a "seller . . . engaged in the business of selling . . . [a] product";⁶ (3) "physical harm caused by a product";⁷ (4) a product that is "in a defective condition unreasonably dangerous to . . . [a] user or consumer" or to his property;⁸ and (5) a product that "reach[ed] the user or consumer without substantial alteration in . . . [its] condition."⁹ Indiana Code section 34-20-1-1 makes clear that the IPLA governs and controls all claims that satisfy these five requirements, "regardless of the substantive legal theory or theories upon which the action is brought."¹⁰

A. "User" or "Consumer"

The language the Indiana General Assembly employs in the IPLA is important for determining who qualifies as an IPLA claimant. Indiana Code section 34-20-1-1 provides that the IPLA governs claims asserted by "users" and "consumers."¹¹ For purposes of the IPLA, "consumer" means:

- (1) a purchaser;
- (2) any individual who uses or consumes the product;
- (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or
- (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.¹²

"User" has the same meaning as "consumer."¹³ Several published decisions in

5. *Id.* § 34-20-2-1(1). Indiana Code section 34-20-1-1 identifies a proper IPLA claimant as a "user" or "consumer." *Id.* § 34-20-1-1(1). Indiana Code section 34-20-2-1(1) requires that IPLA claimants be "in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition." *Id.* § 34-20-2-1(1).

6. *Id.* § 34-20-1-1(2). Indiana Code section 34-20-1-1(2) identifies proper IPLA defendants as "manufacturers" or "sellers." *Id.* Indiana Code section 34-20-2-1(2) provides the additional requirement that such a manufacturer or seller also be "engaged in the business of selling the product," effectively excluding corner lemonade stand operators and garage sale sponsors from IPLA liability. *Id.*

7. *Id.* § 34-20-1-1(3).

8. *Id.* § 34-20-2-1.

9. *Id.* § 34-20-2-1(3).

10. *Id.* § 34-20-1-1.

11. *Id.*

12. *Id.* § 34-6-2-29.

13. *Id.* § 34-6-2-147. A literal reading of the IPLA demonstrates that even if a claimant qualifies as a statutorily-defined "user" or "consumer," he or she also must satisfy another statutorily-defined threshold before proceeding with a claim under the IPLA. *Id.* § 34-20-2-1(1).

recent years construe the statutory definitions of “user” and “consumer.”¹⁴

Courts in Indiana have been relatively quiet since 2006 when it comes to interpreting the terms “user” or “consumer” for purposes of the IPLA,¹⁵ though there was one federal trial court decision during last year’s survey period.¹⁶ This year’s survey period did not produce any additional decisions on the topic.

B. “Manufacturer” or “Seller”

For purposes of the IPLA, “[m]anufacturer” . . . means a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer.”¹⁷ “Seller” . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption.”¹⁸ Indiana Code section 34-20-2-1(2) employs nearly identical language when addressing the threshold requirement that liability under the IPLA will not attach unless “the seller is engaged in the business of selling the product.”¹⁹

Courts hold sellers liable as manufacturers in two ways. First, a seller can be held liable as a manufacturer if the seller fits within the definition of “manufacturer” found in Indiana Code section 34-6-2-77(a). Second, a seller can be deemed a statutory “manufacturer” and can therefore be held liable to the same

That additional threshold is found in Indiana Code section 34-20-2-1(1), which requires that the “user” or “consumer” also be “in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition.” *Id.* Thus, the plain language of the statute assumes that a person or entity must already qualify as a “user” or a “consumer” *before* a separate “reasonable foreseeability” analysis is undertaken. In that regard, the IPLA does not appear to provide a remedy to a claimant whom a seller might reasonably foresee as being subject to the harm caused by a product’s defective condition if that claimant falls outside of the IPLA’s definition of “user” or “consumer.”

14. See, e.g., *Butler v. City of Peru*, 733 N.E.2d 912, 919 (Ind. 2000); *Estate of Shebel v. Yaskawa Elec. Am., Inc.*, 713 N.E.2d 275, 279 (Ind. 1999). For a more detailed analysis of *Butler*, see Joseph R. Alberts & David M. Henn, *Survey of Recent Developments in Indiana Product Liability Law*, 34 IND. L. REV. 857, 870-72 (2001). For a more detailed analysis of *Estate of Shebel*, see Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 33 IND. L. REV. 1331, 1333-36 (2000).

15. During the 2006 survey period, the Indiana Supreme Court decided *Vaughn v. Daniels Co. (W. Va.)*, 841 N.E.2d 1133 (Ind. 2006). That case helped to further define who qualifies as a “user” or “consumer” for purposes of bringing an action under the IPLA.

16. *Pawlik v. Indus. Eng’g & Equip. Co.*, No. 2:07-CV-220, 2009 WL 857476 (N.D. Ind. Mar. 27, 2009).

17. IND. CODE § 34-6-2-77(a).

18. *Id.* § 34-6-2-136.

19. *Id.* § 34-20-2-1(2); see, e.g., *Williams v. REP Corp.*, 302 F.3d 660, 662-64 (7th Cir. 2002); *Del Signore v. Asphalt Drum Mixers*, 182 F. Supp. 2d 730, 745-46 (N.D. Ind. 2002); see also Joseph R. Alberts & James M. Boyers, *Survey of Recent Developments in Indiana Product Liability Law*, 36 IND. L. REV. 1165, 1169-72 (2003).

extent as a manufacturer in one other limited circumstance.²⁰ Indiana Code section 34-20-2-4 provides that a seller may be deemed a “manufacturer” “[i]f a court is unable to hold jurisdiction over a particular manufacturer” and if the seller is the “manufacturer’s principal distributor or seller.”²¹

Practitioners also must be aware that when the theory of liability is based upon “strict liability in tort,”²² Indiana Code section 34-20-2-3 provides that an entity that is merely a “seller” and cannot otherwise be deemed a “manufacturer” is not liable and is not a proper IPLA defendant.²³

This has been a relatively active area of product liability law in recent years, and a number of recent Indiana decisions, particularly from Indiana federal courts, have addressed the statutory definitions of “seller” and “manufacturer.”²⁴ Last year’s survey period produced three decisions in this area,²⁵ and this year’s survey period produced yet another two. In *State Farm Fire & Casualty v. Jarden Corp.*,²⁶ the plaintiff sought damages for property damage caused by an allegedly defective space heater.²⁷ The plaintiff sued the manufacturer and the

20. IND. CODE § 34-20-2-4.

21. *Id.* *Kennedy v. Guess, Inc.*, 806 N.E.2d 776 (Ind. 2004), is the most recent case interpreting Indiana Code section 34-20-2-4 and specifically addressed the circumstances under which entities may be considered “manufacturers” or “sellers” under the IPLA. *See also* Goines v. Fed. Express Corp., No. 99-CV-4307-JPG, 2002 U.S. Dist. LEXIS 5070, at *14-15 (S.D. Ill. Jan. 8, 2002).

22. The phrase “strict liability in tort,” to the extent that it is intended to mean “liability without regard to reasonable care,” appears to encompass only claims that attempt to prove that a product is defective and unreasonably dangerous by utilizing a manufacturing defect theory. Indiana Code section 34-20-2-2 provides that a negligence standard governs cases utilizing a design defect or a failure to warn theory, not a “strict liability” standard. IND. CODE § 34-20-2-2.

23. *Id.* § 34-20-2-3. The IPLA makes it clear that liability without regard to the exercise of reasonable care (strict liability) applies only to product liability claims alleging a manufacturing defect theory, and a negligence standard controls claims alleging design or warning defect theories. *See, e.g.*, *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899 (N.D. Ind. 2002); *see also* Alberts & Boyers, *supra* note 19, at 1173-75.

24. *E.g.*, *Mesman v. Crane Pro Servs.*, 512 F.3d 352, 356 (7th Cir. 2008); *LaBonte v. Daimler-Chrysler*, No. 3:07-CV-232, 2008 WL 513319, at *1-2 (N.D. Ind. Feb. 22, 2008). For a detailed discussion about *Mesman* and *LaBonte*, *see* Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 42 IND. L. REV. 1093, 1098-1102 (2009); *see also* *Fellner v. Phila. Toboggan Coasters, Inc.*, No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006); *Thornburg v. Stryker Corp.*, No. 1:05-cv-1378-RLY-TAB, 2006 WL 1843351 (S.D. Ind. June 29, 2006).

25. *See* *Pawlik v. Indus. Eng’g & Equip. Co.*, No. 2:07-CV-220, 2009 WL 857476 (N.D. Ind. Mar. 27, 2009); *Gibbs v. I-Flow, Inc.*, No. 1:08-cv-708-WTL-TAB, 2009 U.S. Dist. LEXIS 14895 (S.D. Ind. Feb. 24, 2009); *Duncan v. M & M Auto Serv., Inc.*, 898 N.E.2d 338 (Ind. Ct. App. 2008); *see also* Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 43 IND. L. REV. 873, 879-82 (2010).

26. No. 1:08-cv-1506-SEB-DML, 2010 WL 2541249 (S.D. Ind. June 16, 2010).

27. *Id.* at *1.

manufacturer's parent corporation.²⁸ The parent corporation moved for summary judgment, claiming that it was not a manufacturer or seller under the IPLA.²⁹ The plaintiff argued that the parent corporation was an interested party because it held itself out on its website as the provider of many branded products, including the space heater at issue.³⁰ The court determined that the website was insufficient to create a question of fact regarding whether the parent corporation was a "manufacturer" within the meaning of the IPLA.³¹ All materials designated by the parent corporation demonstrated that it did not manufacture or sell the space heater.³² The court noted that the general rule is that: "a parent corporation . . . is not liable for the acts of its subsidiaries."³³ In the absence of any evidence showing that the parent corporation actually manufactured or sold the space heater, the court held that summary judgment was appropriate.³⁴

In a federal case filed in the Northern District of Indiana, *Kucik v. Yamaha Motor Corp.*,³⁵ Judge Theresa Springmann granted summary judgment in part because the named defendant could not be liable as the manufacturer pursuant to Indiana Code section 34-20-2-3.³⁶ There, the plaintiff was injured when a Yamaha motorcycle he was riding lost power during an attempted jump.³⁷ The plaintiff attempted to hold liable Yamaha Motor Corporation, the distributor of the motorcycle, under several IPLA-based theories of recovery. The motorcycle at issue was designed by Yamaha Motor Company Ltd., a Japanese company, not by Yamaha Motor Corporation.³⁸ Therefore, Yamaha Motor Corporation could only be liable under the IPLA if the court was unable to hold jurisdiction over Yamaha Motor Company, the actual manufacturer, and Yamaha Motor Corporation was its principal distributor.³⁹ The court noted that both of the parties presented argument on the issue, but neither submitted credible evidence to the court.⁴⁰ Because the plaintiff had the burden of proof and because he had failed to present sufficient admissible evidence to create a question of fact to bring the case within the purview of the IPLA, Judge Springmann granted summary judgment.⁴¹

28. *Id.*

29. *Id.* at *6.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* (quoting *United States v. Best Foods*, 524 U.S. 51, 55-56 (1998)).

34. *Id.* at *7.

35. No. 2:08-CV-161-TS, 2010 WL 2694962 (N.D. Ind. July 2, 2010).

36. *Id.* at *8.

37. *Id.* at *2.

38. *Id.* at *7.

39. *Id.* (citing *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 776-81 (Ind. 2004)).

40. *Id.* at *8.

41. *Id.* at *9.

C. *Physical Harm Caused by a Product*

For purposes of the IPLA, “[p]hysical harm” . . . means bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.”⁴² It “does not include gradually evolving damage to property or economic losses from such damage.”⁴³

For purposes of the IPLA, “[p]roduct” . . . means any item or good that is personalty at the time it is conveyed by the seller to another party. The term does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.”⁴⁴

During last year’s survey period, federal trial courts in Indiana twice issued decisions addressing whether “products” were involved.⁴⁵ This year’s survey period produced no additional decisions.

D. *Defective and Unreasonably Dangerous*

Only products that are in a “defective condition” are subject to IPLA liability.⁴⁶ For purposes of the IPLA, a product is in a “defective condition”

if, at the time it is conveyed by the seller to another party, it is in a condition:

- (1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and
- (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.⁴⁷

Recent cases confirm that establishing one of the foregoing threshold requirements without the other will not result in liability under the IPLA.⁴⁸

42. IND. CODE § 34-6-2-105(a) (2011).

43. *Id.* § 34-6-2-105(b); *see, e.g.*, *Miceli v. Ansell, Inc.*, 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998); *Fleetwood Enters., Inc. v. Progressive N. Ins. Co.*, 749 N.E.2d 492, 493 (Ind. 2001); *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 486 (Ind. 2001); *see also* *Great N. Ins. Co. v. Buddy Gregg Motor Homes, Inc.*, No. IP 00-1378-C-H/K, 2002 U.S. Dist. LEXIS 7830, at *2 (S.D. Ind. Apr. 29, 2002).

44. IND. CODE § 34-6-2-114; *see also* *Fincher v. Solar Sources, Inc.*, No. 42A01-0701-CV-25, 2007 WL 1953473, at *6 (Ind. Ct. App. July 6, 2007) (unpublished table disposition).

45. *See* *Chappey v. Ineos USA LLC*, No. 2:08-CV-271, 2009 U.S. Dist. LEXIS 24807 (N.D. Ind. Mar. 23, 2009); *Carlson Rests. Worldwide, Inc. v. Hammond Prof'l Cleaning Servs.*, No. 2:06 cv 336, 2008 U.S. Dist. LEXIS 91878 (N.D. Ind. Nov. 12, 2008); *see also* *Alberts et al.*, *supra* note 25, at 882-84.

46. IND. CODE § 34-20-2-1; *see also* *Westchester Fire Ins. Co. v. Am. Wood Fibers, Inc.*, No. 2:03-CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006).

47. IND. CODE § 34-20-4-1.

48. *See* *Baker v. Heye-Am.*, 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003) (“[U]nder the IPLA, the plaintiff must prove that the product was in a defective condition that rendered it unreasonably dangerous.” (citing *Cole v. Lantis Corp.*, 714 N.E.2d 194, 198 (Ind. Ct. App. 1999))).

Claimants in Indiana may prove that a product is in a “defective condition” by asserting one or a combination of three theories: (1) the product has a defect in its design (a “design defect”); (2) the product lacks adequate or appropriate warnings (a “warning defect”); or (3) the product has a defect that is the result of a problem in the manufacturing process (a “manufacturing defect”).⁴⁹

Indiana law also defines when a product may be considered “unreasonably dangerous” for purposes of the IPLA. A product is “unreasonably dangerous” only if its use “exposes the user or consumer to a risk of physical harm . . . beyond that contemplated by the ordinary consumer who purchases . . . [it] with the ordinary knowledge about the product’s characteristics common to the community of consumers.”⁵⁰ A product is not unreasonably dangerous as a matter of law if it injures in a fashion that, by objective measure, is known to the community of persons consuming the product.⁵¹

In cases alleging improper design or inadequate warnings as the theory for proving that a product is in a “defective condition,” recent decisions have recognized that the substantive defect analysis (i.e., whether a design was inappropriate or whether a warning was inadequate) should follow a threshold analysis that first examines whether, in fact, the product at issue is “unreasonably dangerous.”⁵²

49. See *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 689 (7th Cir. 2004); *Westchester Fire Ins. Co.*, 2006 WL 3147710, at *5; *Baker*, 799 N.E.2d at 1140; *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 161 (Ind. Ct. App. 1997); see also *Troutner v. Great Dane Ltd. P’ship*, No. 2:05-CV-040-PRC, 2006 WL 2873430, at *3 (N.D. Ind. Oct. 5, 2006). Although claimants are free to assert any of those three theories for proving that a product is in a “defective condition,” the IPLA provides explicit statutory guidelines identifying when products are not defective as a matter of law. Indiana Code section 34-20-4-3 provides that “[a] product is not defective under . . . [the IPLA] if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under . . . [the IPLA].” Ind. Code § 34-20-4-3. See also *Hunt v. Unknown Chem. Mfr. No. One*, No. IP 02-389-C-M/S, 2003 U.S. Dist. LEXIS 20138, at *27-37 (S.D. Ind. Nov. 5, 2003). In addition, Indiana Code section 34-20-4-4 provides that “[a] product is not defective under . . . [the IPLA] if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.” IND. CODE § 34-20-4-4.

50. IND. CODE. § 34-6-2-146; see also *Baker*, 799 N.E.2d at 1140; *Cole v. Lantis Corp.*, 714 N.E.2d 194, 199 (Ind. Ct. App. 1999).

51. See *Baker*, 799 N.E.2d at 1140; see also *Moss v. Crosman Corp.*, 136 F.3d 1169, 1174 (7th Cir. 1998) (finding that a product may be “dangerous” in the colloquial sense, but not “unreasonably dangerous” for purposes of IPLA liability). An open and obvious danger negates liability. “‘To be unreasonably dangerous, a defective condition must be hidden or concealed.’ Thus, ‘evidence of the open and obvious nature of the danger . . . negates a necessary element of the plaintiff’s prima facie case that the defect was hidden.’” *Hughes v. Battenfeld Gloucester Eng’g Co.*, No. TH 01-0237-C T/H, 2003 U.S. Dist. LEXIS 17177, at *7-8 (S.D. Ind. Aug. 20, 2003) (quoting *Cole*, 714 N.E.2d at 199).

52. See *Conley v. Lift-All Co.*, No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468,

The IPLA imposes a negligence standard in all product liability claims relying upon a design or warning theory to prove defectiveness, while retaining strict liability (liability despite the “exercise of all reasonable care”) only for those claims relying upon a manufacturing defect theory.⁵³ Despite the IPLA’s unambiguous language and several years’ worth of authority recognizing that “strict liability” applies only in cases involving alleged manufacturing defects, some courts unfortunately continue to employ the term “strict liability” when referring to IPLA claims. Courts have discussed strict liability even when those claims allege warning and design defects and clearly accrued after the 1995 IPLA amendments took effect.⁵⁴ The IPLA makes clear that, just as in any other negligence case, a claimant advancing design or warning defect theories must satisfy the traditional negligence requirements: duty, breach, injury, and causation.⁵⁵

The 2010 survey period produced yet another decision dealing directly with whether a product is defective and unreasonably dangerous as a matter of law. In *Kucik v. Yamaha Motor Corp.*,⁵⁶ Judge Springmann granted summary judgment because the plaintiff failed to demonstrate that the motorcycle at issue contained a manufacturing or design defect that proximately caused the accident at issue or the plaintiff’s injuries.⁵⁷ On March 1, 2006, the plaintiff purchased a

at *13-14 (S.D. Ind. July 25, 2005) (involving an alleged warning defect); *Bourne v. Marty Gilman, Inc.*, No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *1-2 (S.D. Ind. July 20, 2005), *aff’d*, 452 F.3d 632 (7th Cir. 2006) (involving an alleged design defect).

53. See *Mesman v. Crane Pro Servs.*, 409 F.3d 846, 849 (7th Cir. 2005); *Inlow II*, 378 F.3d at 689 n.4 (7th Cir. 2004); *Conley*, 2005 U.S. Dist. LEXIS 15468, at *12-13; *Bourne*, 2005 U.S. Dist. LEXIS 15467, at *9 n.2; see also *Miller v. Honeywell Int’l, Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at *37-38 (S.D. Ind. Oct. 15, 2002); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); *Birch ex rel. Birch v. Midwest Garage Door Sys.*, 790 N.E.2d 504, 518 (Ind. Ct. App. 2003).

54. See, e.g., *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Burt*, 212 F. Supp. 2d at 900; see also *Fellner v. Phila. Toboggan Coasters Inc.*, No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068, at *1, *3-4 (S.D. Ind. Aug. 2, 2006); *Cincinnati Ins. Cos. v. Hamilton Beach/Proctor-Silex, Inc.*, No. 4:05 CV 49, 2006 WL 299064, at *2-3 (N.D. Ind. Feb. 7, 2006); *Vaughn v. Daniels Co. (W. Va.)*, 841 N.E.2d 1133, 1138-39 (Ind. 2006).

55. The Indiana Supreme Court’s decision in 2009 in *Kovach v. Caligor Midwest*, 913 N.E.2d 193 (Ind. 2009), *reh’g denied*, articulates very well the concept that plaintiffs must establish all negligence elements, including causation, as a matter of law in a product liability case to survive summary disposition. See also *Conley*, 2005 U.S. Dist. LEXIS 15468, at *13-14.

56. No. 2:08-CV-161-TS, 2010 WL 2694962 (N.D. Ind. July 2, 2010).

57. *Id.* at *9. Before granting Yamaha’s summary judgment motion, the court issued two earlier opinions. The first, issued on October 16, 2009, 2009 WL 3401978 (N.D. Ind. Oct. 16, 2009), granted the plaintiff’s motion for leave to file a response to Yamaha’s motion to dismiss. *Id.* at *3. In the second, the court denied Yamaha’s motion to dismiss as a sanction against plaintiff for his failure to preserve the motorcycle at issue. 2009 WL 5200537, at *3 (N.D. Ind. Dec. 23, 2009).

Yamaha motorcycle.⁵⁸ Approximately two months later, he was injured when the motorcycle lost power during an attempted jump.⁵⁹ Several weeks after the accident, the plaintiff received a letter from Yamaha informing him that some intake valves manufactured for the motorcycle “had experienced fatigue in the neck area when operated at maximum RPM,” which could cause a loss of power and possible engine failure.⁶⁰ After receiving the letter, the plaintiff had the valves replaced.⁶¹ He later sold the motorcycle, and the parties to the suit were apparently unable to locate the motorcycle once the suit was commenced.⁶²

Two years after the incident, the plaintiff filed suit.⁶³ His multi-count complaint alleged defective design, manufacturing defect, product liability, and inadequate warnings and instructions, as well as common law negligence, breach of warranty, and punitive damages.⁶⁴ Each of the claims was premised on the presence of a defect in the intake valves, which were the subject of the previous recall.⁶⁵

Judge Springmann reasoned that regardless of the substantive IPLA theory on which the plaintiff proceeded, he was required to prove that the motorcycle was in a defective condition that rendered it unreasonably dangerous.⁶⁶ The dispositive issue was whether the loss of power which the plaintiff claimed to have experienced was the result of a defect in the motorcycle, particularly in its intake valves.⁶⁷ The plaintiff relied on testimony from a motorcycle mechanic and Yamaha’s recall notice.⁶⁸ The court found the mechanic’s testimony unconvincing because it assumed that the incident was caused by the recall.⁶⁹ Similarly, the plaintiff could not rely on the recall notice issued by Yamaha because it was a subsequent remedial measure.⁷⁰ Because there was no admissible evidence from which a jury could reasonably infer that the plaintiff’s motorcycle was manufactured and designed with a specific defect, his product liability claims failed as a matter of law.⁷¹

We now addresses in detail a few cases in which plaintiffs attempted to demonstrate that products were defective and unreasonably dangerous utilizing warning, design, and manufacturing defect theories.

1. *Warning Defect Theory*.—The IPLA contains a specific statutory

58. *Kucik*, 2010 WL 2694962, at *2.

59. *Id.*

60. *Id.*

61. *Id.* at *3.

62. *Id.*

63. *Id.* at *1.

64. *Id.* at *3-4, *9.

65. *See id.*

66. *Id.* at *4 (citing *Baker v. Heye-Am.*, 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003)).

67. *Id.* at *5.

68. *Id.* at *5-6.

69. *Id.* at *5.

70. *Id.* at *6.

71. *Id.* at *7.

provision covering the warning defect theory, which reads as follows:

A product is defective . . . if the seller fails to:

- (1) package or label the product to give reasonable warnings of danger about the product; or
- (2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.⁷²

In failure to warn cases, the “unreasonably dangerous” inquiry is essentially the same as the requirement that the defect be latent or hidden.⁷³

Federal and state courts in Indiana have been busy in recent years when addressing issues in cases involving allegedly defective warnings and instructions. Some of those cases include: *Cook v. Ford Motor Co.*,⁷⁴ *Gibbs v. I-Flow, Inc.*,⁷⁵ *Deaton v. Robison*,⁷⁶ *Clark v. Oshkosh Truck Corp.*,⁷⁷ *Ford Motor Co. v. Rushford*,⁷⁸ *Tober v. Graco Children’s Products, Inc.*,⁷⁹ *Williams v. Genie Industries, Inc.*,⁸⁰ *Conley v. Lift-All Co.*,⁸¹ *First National Bank & Trust Corp. v. American Eurocopter Corp. (Inlow II)*,⁸² and *Birch v. Midwest Garage Door Systems*.⁸³

72. IND. CODE § 34-20-4-2 (2011); *see also* *Deaton v. Robison*, 878 N.E.2d 499, 501-03 (Ind. Ct. App. 2007); *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522, 527 (Ind. Ct. App. 2004) (both noting the standard for proving a warning defect case).

73. *See* *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 690 n.5 (7th Cir. 2004). For a more detailed analysis of *Inlow II*, *see* Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 38 IND. L. REV. 1205, 1222-27 (2005).

74. 913 N.E.2d 311 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 785 (Ind. 2010). For a more detailed analysis of the *Cook* case, *see* Alberts et al., *supra* note 25, at 893-96.

75. No. 1:08-cv-708-WTL-TAB, 2009 U.S. Dist. LEXIS 14895 (S.D. Ind. Feb. 24, 2009). For a more detailed analysis of the *Gibbs* case, *see* Alberts et al., *supra* note 25, at 881-82.

76. 878 N.E.2d 499 (Ind. Ct. App. 2007). For a more complete discussion of *Deaton*, *see* Alberts et al., *supra* note 24, at 1110-14.

77. No. 1:07-cv-0131-LJM-JMS, 2008 WL 2705558 (S.D. Ind. July 10, 2008). For a more detailed discussion about *Clark* and potential problems it might create for practitioners, *see* Alberts et al., *supra* note 24, at 1114-18.

78. 868 N.E.2d 806 (Ind. 2007). For a more detailed discussion and commentary about *Rushford*, *see* Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 41 IND. L. REV. 1165, 1184-87 (2008).

79. 431 F.3d 572 (7th Cir. 2005). For more detailed discussion and commentary about *Tober*, *see* Joseph R. Alberts & James Petersen, *Survey of Recent Developments in Indiana Product Liability Law*, 40 IND. L. REV. 1007, 1028-30 (2007).

80. No. 3:04-CV-217 CAN, 2006 WL 1408412 (N.D. Ind. May 19, 2006). For more detailed discussion and commentary about *Williams*, *see* Alberts & Petersen, *supra* note 79, at 1032-33.

81. No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468 (S.D. Ind. July 25, 2005).

82. 378 F.3d 682 (7th Cir. 2004).

83. 790 N.E.2d 504 (Ind. Ct. App. 2003). For a more detailed analysis of *Birch*, *see* Joseph R. Alberts & Jason K. Bria, *Survey of Recent Developments in Product Liability Law*, 37 IND. L.

The 2010 survey period added five more cases to that list, all of which merit further discussion here. The first one, *Gardner v. Tristar Sporting Arms, Ltd.*,⁸⁴ involved a plaintiff who was injured when a shotgun he was holding in his lap discharged.⁸⁵ The plaintiff testified that he placed the shotgun across his lap with the safety turned to the “on” position as he drove his ATV home from a hunting trip.⁸⁶ He alleged that the shotgun spontaneously fired, even with the safety on.⁸⁷ Investigators at the scene confirmed that the safety was on and that the shotgun could be fired despite the safety.⁸⁸ The plaintiff alleged that the manufacturer negligently failed to warn of this danger.⁸⁹ The manufacturer moved for summary judgment.⁹⁰ The court granted summary judgment on the failure to warn claim because it was undisputed that the plaintiff failed to read the gun's instruction manual, noting that

[e]vidence that the plaintiff, injured party, or other party instrumental in the use of the product leading to an injury failed to read instructions or warnings which were provided with the product may be sufficient to entitle the defendant to judgment as a matter of law, at least where the failure to read the instructions or warnings is not disputed.⁹¹

Because the plaintiff admitted he did not read the instruction manual, the plaintiff could not show that the alleged inadequate warnings caused the plaintiff's injury.⁹²

The second warnings defect case we address, *Colter v. Rockwell Automation, Inc.*,⁹³ was one in which the plaintiff was injured by a device used to make automotive parts called a “shooter press.”⁹⁴ The machine requires both hands to be placed on proximity switches to operate.⁹⁵ The plaintiff argued that “the shooter press spontaneously cycled onto his hand” when he reached out to take a finished part off the press.⁹⁶ The plaintiff claimed that improper and negligent wiring of the proximity switches allowed the shooter press to cycle

REV. 1247, 1262-64 (2004); *see also* *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 895-96 (N.D. Ind. 2002); *McClain v. Chem-Lube Corp.*, 759 N.E.2d 1096, 1103 (Ind. Ct. App. 2001). For a more detailed analysis of *Burt* and *McClain*, *see* Alberts & Boyers, *supra* note 19, at 1183-85.

84. No. 1:09-cv-0671-TWP-WGH, 2010 WL 3724190 (S.D. Ind. Sept. 15, 2010).

85. *Id.* at *1.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at *4.

90. *Id.*

91. *Id.* (quoting 63A AM. JUR. 2D *Products Liability* §1132 (2011)).

92. *Id.*

93. No. 3:08-CV-527JVB, 2010 WL 3894560 (N.D. Ind. Sept. 29, 2010).

94. *Id.* at *1.

95. *Id.*

96. *Id.*

inadvertently.⁹⁷ Further, the manufacturer failed to warn of the consequences of wiring in such a manner.⁹⁸ In support of this assertion, the plaintiff offered expert testimony regarding the wiring.⁹⁹ The defendant argued that the expert was not qualified to testify on a failure to warn claim because he was not qualified to render an opinion related to the adequacy of written warnings.¹⁰⁰ The court noted that in a failure to warn claim, “the underlying factor is the need to issue a warning in the first place. In other words, the claim cannot move forward unless the plaintiff shows that the defendant knew or should have known that its product was dangerous at the time the plaintiff’s injury occurred.”¹⁰¹ The court found that the expert did not need to have specialized knowledge or experience in written warnings because his opinion related to the safety of the manufacturer’s product on the day of the plaintiff’s injury.¹⁰² His educational and professional background qualified him to testify regarding that point.¹⁰³ Thus, the court did not exclude the expert’s testimony.¹⁰⁴

The third warnings defect case was *Meharg v. Iflow Corp.*¹⁰⁵ There, the plaintiff alleged that the cartilage in her shoulder was destroyed by the “off-label” use of a prescription drug administered via a pain pump.¹⁰⁶ The prescription drug was not designed for that particular use; however, the plaintiff claimed that the manufacturer should have known that doctors used the drug in off-label applications and should have warned against it.¹⁰⁷ The drug manufacturer alleged that there was no duty to warn of the off-label use.¹⁰⁸ The court stated,

In cases such as this one that involve an off-label use of a prescription drug that is not endorsed or promoted by the manufacturer, the requisite knowledge of the risk is two-fold: the manufacturer must know (or be charged with knowledge of) both that the off-label use is occurring and that the off-label use carries with it risk of harm at issue—in this case, damaged cartilage.¹⁰⁹

The plaintiff offered evidence of several articles suggesting that repeated injections can cause harm to cartilage.¹¹⁰ However, the court found that as a matter of law, these articles were insufficient to demonstrate that at the time of

97. *Id.*

98. *Id.*

99. *Id.* at *1-2.

100. *Id.* at *3.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. No. 1:08-cv-184-WTL-TAB, 2010 WL 711317 (S.D. Ind. Mar. 1, 2010).

106. *Id.* at *1.

107. *Id.* at *2.

108. *Id.*

109. *Id.*

110. *Id.* at *2-3.

the plaintiff's surgery, the drug manufacturer knew or should have known of the risk of cartilage damage.¹¹¹

The fourth warnings defect case was *Lapsley v. Xtek, Inc.*¹¹² In *Lapsley*, the plaintiff was injured when he was greasing a spindle designed by the manufacturer.¹¹³ The spindle was equipped with a “zerk” fitting.¹¹⁴ The zerk fitting was a valve through which grease was injected into the spindle.¹¹⁵ Shortly before the accident, the plaintiff removed the zerk fitting so he could grease the spindle more quickly.¹¹⁶ He did not replace the zerk fitting and left the area for a short time.¹¹⁷ When he returned, he was struck by a high-pressure stream of grease.¹¹⁸ The plaintiff brought a failure to warn claim.¹¹⁹ The court noted that a manufacturer must give a warning only if “(1) it knew or had reason to know that the product was likely to be dangerous when used in the manner employed by the plaintiff; and (2) it had no reason to believe that plaintiff would realize that dangerous condition.”¹²⁰ The court found that there was no duty to warn if there was only a remote possibility of danger from use of the product.¹²¹ Thus, the manufacturer was entitled to summary judgment because the plaintiff introduced no evidence that the manufacturer knew or should have known that its spindle was likely to inject high-pressure grease through the zerk opening.¹²² There was no evidence of other similar incidents, and there was no evidence of tests, studies, publications, or other industry reports that would have made the manufacturer aware of a risk of harm resulting from the open zerk fitting.¹²³

The fifth warnings defect case was styled *Hatter v. Pierce Manufacturing, Inc.*¹²⁴ It was a case in which the plaintiff was a firefighter who was injured when a cap on a fire truck's intake pipe was propelled off the pipe by pressurized air.¹²⁵ The plaintiff brought a failure to warn claim, and the manufacturer argued that the sophisticated intermediary doctrine was a defense.¹²⁶ The court noted that “[t]he sophisticated intermediary doctrine provides a defense to a manufacturer's duty to warn and is applicable only if the intermediary—in this case, [the fire department] . . . as the intermediary between . . . [manufacturer] and . . .

111. *Id.* at *3.

112. No. 2:05-CV-174JVB, 2010 WL 1189809 (S.D. Ind. Mar. 23, 2010).

113. *Id.* at *2.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at *4.

120. *Id.*

121. *Id.* (citation omitted).

122. *Id.*

123. *Id.*

124. 934 N.E.2d 1160 (Ind. Ct. App. 2010).

125. *Id.* at 1163.

126. *Id.* at 1169.

[plaintiff]—knew or should have known of the product’s dangers.”¹²⁷ Thus, if the intermediary has knowledge or sophistication equal to the manufacturer, the manufacturer can rely on the intermediary to warn the consumer.¹²⁸ The court found in this case that there was sufficient evidence for the jury to have inferred that the fire department should have known of the danger arising from the pressure valve and release cap.¹²⁹ The firefighters were aware that the pipes on the trucks could become pressurized, and their previous difficulty with the cap should have placed them on notice that the pipe could become pressurized.¹³⁰ Accordingly, the court found that the sophisticated intermediary jury instruction was appropriately given.¹³¹

The sixth and final warnings defect case we address in this Survey is *Tucker v. SmithKline Beecham Corp.*,¹³² a case in which the decedent committed suicide after taking the prescription drug Paxil.¹³³ The estate argued that Paxil increased the risk of suicide and that the manufacturer failed to warn of this increased risk.¹³⁴ The manufacturer had a warning that stated that the possibility of suicide is inherent in any major depressive disorder, and high-risk patients should be monitored closely.¹³⁵ The court determined that there was a question of fact about whether the warning was adequate.¹³⁶ According to the court, “Paxil’s 2002 label stated only the well-known fact that suicide is a risk with all patients suffering from MDD. It did not warn that taking Paxil could increase that risk.”¹³⁷ Accordingly, the court believed that a question of fact regarding the warning’s adequacy precluded summary disposition.¹³⁸

2. *Design Defect Theory.*—Decisions that address substantive design defect allegations in Indiana require plaintiffs to prove the existence of what practitioners and judges often refer to as a safer, feasible alternative design.¹³⁹ Plaintiffs must demonstrate that another design not only could have prevented the injury, but that the alternative design was effective, safer, more practicable, and more cost-effective than the one at issue.¹⁴⁰ One panel of the Seventh Circuit

127. *Id.* at 1170.

128. *Id.*

129. *Id.* at 1171.

130. *Id.*

131. *Id.*

132. 701 F. Supp. 2d 1040 (S.D. Ind. 2010).

133. *Id.* at 1043.

134. *Id.* at 1066.

135. *Id.* at 1067.

136. *Id.*

137. *Id.*

138. *Id.* at 1068.

139. In cases alleging improper design to prove that a product is in a “defective condition,” the substantive defect analysis may need to follow a threshold “unreasonably dangerous” analysis if one is appropriate. *See, e.g., Bourne v. Marty Gilman, Inc.*, No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *10-20 (S.D. Ind. July 20, 2005), *aff’d*, 452 F.3d 632 (7th Cir. 2006).

140. *See Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Burt v. Makita*

(Judge Easterbrook writing) described that “a design-defect claim in Indiana is a negligence claim, subject to the understanding that negligence means failure to take precautions that are less expensive than the net costs of accidents.”¹⁴¹ Phrased in a slightly different way, “[t]he [p]laintiff bears the burden of proving a design to be unreasonable, and must do so by showing there are other safer alternatives, and that the costs and benefits of the safer design make it unreasonable to use the less safe design.”¹⁴²

The Indiana Supreme Court in *Schultz v. Ford Motor Co.*¹⁴³ endorsed the foregoing burden of proof analysis in design defect claims in Indiana.¹⁴⁴ State and federal courts applying Indiana law have issued several important decisions in recent years that address design defect claims.¹⁴⁵ The 2010 survey period contributed three more cases to the scholarship in this area.

In the first of those three cases, *TRW Vehicle Safety Systems, Inc. v. Moore*,¹⁴⁶ the plaintiff was killed after being ejected through the sunroof of his Ford

USA, Inc., 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

141. *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998).

142. *Westchester Fire Ins. Co. v. Am. Wood Fibers, Inc.*, No. 2:03-CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006) (citing *Bourne*, 452 F.3d at 638). Another recent Seventh Circuit case postulated that a design defect claim under the IPLA requires applying the classic formulation of negligence: B [burden of avoiding the accident] < P [probability of the accident that the precaution would have prevented] multiplied by L [loss that the accident, if it occurred, would cause]. See *Bourne*, 452 F.3d at 637; see also *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (explaining Judge Learned Hand’s articulation of the “B < PL” negligence formula).

143. 857 N.E.2d 977 (Ind. 2006).

144. *Id.* at 985 n.12 (“For a discussion of the burden of proof at summary judgment in a design defect claim, see Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 39 IND. L. REV. 1145, 1158-60 (2006).”).

145. See, e.g., *Mesman v. Crane Pro Servs.*, 512 F.3d 352, 359 (7th Cir. 2008); *Bourne*, 452 F.3d at 633, 638-39; *Westchester Fire Ins. Co.*, 2006 WL 3147710, at *5; *Fueger v. CNH Am. LLC*, 893 N.E.2d 330, 333 (Ind. Ct. App. 2008); *Lytle v. Ford Motor Co.*, 814 N.E.2d 301, 317-18 (Ind. Ct. App. 2004); *Baker v. Heye-Am.*, 799 N.E.2d 1135, 1143-44 (Ind. Ct. App. 2003).

146. 936 N.E.2d 201 (Ind. 2010). The court announced its decision on October 13, 2010, which is slightly outside the designated 2010 survey period. The authors have included the case in an effort to make the survey period article more comprehensive and timely. It is interesting to note that in the 2009 survey period article, we addressed in detail the Indiana Court of Appeals’s decision in the same case, though there it was styled *Ford Motor Co. v. Moore*, 905 N.E.2d 418 (Ind. Ct. App. 2009), *vacated*, 936 N.E.2d 201 (Ind. 2010). We predicted then that the guidance provided by the *Moore* opinion might prove to be short-lived because the Indiana Supreme Court had granted transfer when the article was published. See Alberts et al., *supra* note 25, at 899. That turned out to be prophetic because the *Moore* decision was supplanted by the Indiana Supreme Court’s decision only a few months later. Although the Indiana Supreme Court’s decision has now been issued, the court of appeals decision nevertheless remains noteworthy for its comprehensive, scholarly collection and analysis of Indiana’s substantive product liability law.

Explorer during a rollover that followed a tire failure.¹⁴⁷ Moore was ejected from the vehicle even though he was wearing his seatbelt.¹⁴⁸ After a fourteen-day jury trial, the jury found in favor of Moore's estate, awarded damages, and allocated fault as follows: Moore, 33%; Ford Motor Company ("Ford"), 31%; nonparty Goodyear Tire and Rubber Company ("Goodyear") 31%¹⁴⁹; and, defendant TRW Vehicle Safety Systems, Inc. ("TRW"), 5%.¹⁵⁰ Ford, TRW, and Moore raised numerous issues on appeal and cross-appeal. Three are most relevant and noteworthy for this discussion. They are Ford's claims that the evidence was insufficient to support a verdict for negligent design, TRW's claims of the same, and Moore's claims that there was insufficient evidence to support allocation of fault to nonparty Goodyear.

First, Ford asserted that Moore's claims against it were grounded on three different product liability theories—defective seatbelt design, defective sunroof design, and defective design regarding the handling and stability characteristics of the vehicle—and the evidence was insufficient to prove at least one element of each theory.¹⁵¹ Moore responded that there was sufficient evidence to support the jury's verdict against Ford.¹⁵²

The court first noted that because the actions were based on design defect theories, the IPLA did not impose strict liability.¹⁵³ Instead, the standard was negligence.¹⁵⁴ Quoting from the IPLA, the court wrote, "[T]he party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product."¹⁵⁵

The estate claimed that Moore was ejected through the sunroof¹⁵⁶ of the vehicle when the vehicle's seatbelt, which he was wearing, developed slack during the collision.¹⁵⁷ Ford argued that the plaintiff failed to present competent expert testimony establishing the particular standard of care a manufacturer should exercise in designing a product and that Ford breached this standard.¹⁵⁸ Ford also argued that the plaintiff should have presented some evidence of the methodology a manufacturer should use in designing and selecting seatbelts.¹⁵⁹ Additionally, the court noted TRW's arguments that the plaintiff needed to offer

147. *Moore*, 936 N.E.2d at 207.

148. *Id.*

149. Goodyear settled and was therefore not a party at trial. *Id.* at 207 n.1.

150. *Id.* at 207.

151. *Id.* at 208.

152. *Id.*

153. *Id.* at 209.

154. *Id.*

155. *Id.* (quoting IND. CODE § 34-20-2-2 (2011)).

156. The parties agreed that Moore was ejected through the sunroof. The dispute at trial was the cause of Moore's ejection.

157. *Moore*, 936 N.E.2d at 208.

158. *Id.*

159. *Id.*

testing data, studies, or other data to establish a feasible alternative design.¹⁶⁰

The court agreed with the defense claims that Moore's estate bore the burden of proving that Ford breached a duty of care.¹⁶¹ Claims of insufficient evidence to support a verdict are reviewed under a deferential standard.¹⁶² Examining the evidence through this lens, the court was persuaded that sufficient evidence existed in the record to support the jury's verdict against Ford for negligent design.¹⁶³ The plaintiff presented expert testimony from a published mechanical engineer who had studied rollovers.¹⁶⁴ This expert testified that the vehicle's seatbelt system was defective because it allowed "the belt to become unlocked during the rollover portion of a rollover."¹⁶⁵ Moreover, the expert opined that had Ford chosen a seatbelt system design with a pretensioner in the retractor, a system which Ford had used in other passenger vehicles, particularly in Europe, then the belt would not have been able to come unlocked in the collision.¹⁶⁶ Ford disputed this evidence and attacked the expert's credibility, countering that there was no proof that the alternative design was safer.¹⁶⁷

The court, however, was not persuaded. Ford's decision to equip the vehicle at issue without using a retractor pretensioner that it used in other vehicles manufactured in Europe was probative evidence of whether Ford acted with reasonable care.¹⁶⁸ "For the purpose of appellate review for sufficiency, such evidence may support a reasonable inference of seatbelt system design negligence."¹⁶⁹

Similarly, the court was convinced that sufficient evidence existed in the record to support the claim that Ford was negligent when it designed the vehicle's sunroof.¹⁷⁰ Ford argued that the record lacked evidence to support the conclusion that the sunroof became dislodged during the rollover by occupant forces instead of as a result of the violence of the collision.¹⁷¹ And, Ford argued, even if there was such evidence, there was no evidence the sunroof became dislodged due to a structural failure.¹⁷²

The court concluded that whether the roof opening occurred because the glass sunroof became detached due to occupant forces or the severe nature of the collision was not determinative.¹⁷³ It was undisputed that Moore exited the

160. *Id.* at 208-09.

161. *See id.* at 209.

162. *See id.* at 208.

163. *Id.* at 209-10.

164. *Id.* at 209.

165. *Id.* (citation omitted).

166. *Id.* at 209-10.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 210-11.

171. *Id.* at 210.

172. *Id.*

173. *See id.* at 210-11.

vehicle through the sunroof during the rollover.¹⁷⁴ Furthermore, evidence existed in the record that Moore was ejected through the sunroof opening when the glass became dislodged because its mounting brackets failed.¹⁷⁵ The estate had also presented evidence that: had Moore remained inside the vehicle, "he should have survived the accident"; the rollover tendency of sport utility vehicles was widely known before the vehicle at issue was built; and "the use of a stronger sunroof bracket design was technologically and economically feasible."¹⁷⁶ The court did not reweigh the evidence or assess witness credibility.¹⁷⁷ As such, it could not conclude that there was "a complete absence of evidence or reasonable inferences favoring the jury's verdict," and it concluded that "[it] must defer to the jury."¹⁷⁸ The court could not find that the jury decision to attribute partial fault to Ford was unreasonable when it examined the evidence offered and the inferences to be drawn from this evidence.¹⁷⁹

Finally, even though some argument and evidence was offered during trial that the vehicle had design defects relating to its handling and stability, this issue was not submitted to the jury because it was omitted from the trial court's final jury instructions. In addition, the plaintiff did not make reference to a design defect claim in counsel's final argument. Because the issue was neither presented to the jury nor a basis for the verdict, the court declined to address the sufficiency of the evidence to support the claim.¹⁸⁰

Second, TRW, Ford's supplier of the seatbelt assembly, claimed that there was insufficient evidence to support the jury's verdict against it for negligence.¹⁸¹ TRW argued that the evidence at trial proved that "the seatbelt assembly was manufactured according to, and fully complied with, Ford's detailed specifications."¹⁸² In addition, "the seatbelt assembly design was used in the vast majority of cars produced at the time," and Moore's accident was reasonably unforeseeable when the seatbelt assembly was made.¹⁸³ Again, the court relied upon the plain language of the IPLA and wrote that because the estate's claims against TRW alleged defective design, strict liability did not apply.¹⁸⁴ To recover damages, Moore's estate was required to prove that TRW was negligent, i.e., that

174. *Id.* at 210.

175. *Id.*

176. *Id.* (internal citation omitted).

177. *Id.*

178. *Id.* (citing *Martin v. Roberts*, 464 N.E.2d 896, 904 (Ind. 1984)).

179. *Id.*

180. *Id.* at 210-11.

181. *Id.* at 214.

182. *Id.*

183. *Id.* TRW also argued that the seatbelt assembly fully met all government vehicle safety regulations. The court, however, did not discuss whether this was of any significance or whether the rebuttable presumption that the product is not defective and a manufacturer is not negligent as provided in Indiana Code section 34-20-5-1 had any impact on its decision to hold that TRW was not negligent.

184. *Moore*, 936 N.E.2d at 214.

it “failed to exercise reasonable care under the circumstances in designing the product.”¹⁸⁵

Moore’s estate did not dispute TRW’s assertion that it “merely supplied a component part according to Ford’s specifications.”¹⁸⁶ Indeed, at trial, detailed testimony was offered “regarding TRW’s role in building the assembly, particularly the retractor, to Ford’s detailed requirements.”¹⁸⁷ The evidence at trial also indicated that TRW had proposed the development and use of a pretensioner to Ford, noting that pretensioners were in use in 95% of European passenger vehicles, but only in 6% of North American vehicles.¹⁸⁸

The court wrote that “the alleged design negligence [of TRW] was the choice not to use a seatbelt assembly with pretensioners.”¹⁸⁹ Moore’s evidence, however, lacked any proof that the choice to select the assembly without a pretensioner was TRW’s decision.¹⁹⁰ To the contrary, the evidence at trial was that TRW produced a seatbelt assembly according to and in compliance with Ford’s design specifications.¹⁹¹ The court acknowledged that evidence existed in the record of a feasible alternative seatbelt design, but that “there . . . [was] no evidence that TRW was authorized . . . to substitute and supply such an alternative seatbelt design.”¹⁹² The court concluded that the “mere availability of an alternative seatbelt design does not establish negligent design by a defendant that lacks the authority to incorporate it into the assembled vehicle.”¹⁹³ As a result, the court concluded that there was insufficient evidence to support a verdict against TRW.¹⁹⁴

Finally, Moore’s estate claimed that there was insufficient evidence to support any fault allocation to nonparty Goodyear, who had settled prior to trial.¹⁹⁵ Indiana law permits properly pled nonparties to be included on verdict forms for fault allocation.¹⁹⁶ When this occurs, the defendant identifying the nonparty bears the burden of proving the nonparty’s negligence.¹⁹⁷ A discussion related to nonparty fault allocation would often be beyond the purview of this Survey, but because the nonparty claims against Goodyear (as the designer, supplier, and/or manufacturer of the tire that failed in the accident) were governed by the IPLA, it is worthy of brief comment.

185. *Id.* (quoting IND. CODE § 34-20-2-2 (2011)).

186. *Id.* at 215 (citation omitted).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 215-16.

193. *Id.* at 216.

194. *Id.*

195. *Id.* at 224.

196. *See id.* (citing IND. CODE §§ 34-51-2-15 and 34-20-8-1(b) (2011)).

197. *Id.* (citing IND. CODE § 34-51-2-15).

One of the tires on the vehicle involved in the rollover was a Goodyear tire.¹⁹⁸ The vehicle was traveling approximately sixty to seventy miles per hour when the “tire event started to unfold.”¹⁹⁹ Although some testimony related to the tire’s role was elicited, detailed examination or evidence concerning the cause of the tire failure and its specific role in the collision event was never elicited beyond the facts that the tire failed and that this failure precipitated the rollover.²⁰⁰ The court concluded that because there was no evidence establishing whether the tire failure resulted from a tire defect, normal wear and tear, underinflation, a slow leak, road hazard, puncture, or some other cause, there was insufficient evidence to support a product liability verdict against Goodyear if it were a party.²⁰¹ Thus, insufficient evidence existed to support fault allocation against Goodyear as a nonparty.²⁰²

The *Moore* decision could prove to be significant for many reasons. It adds to the ever-growing body of Indiana case law applying negligence principles to product liability cases involving claims of defective design(s) and discussing the importance of establishing the existence of feasible alternative design(s). This, however, should not be surprising because it is the application of the plain language in the IPLA. The decision is also instructive in situations where product liability theories are applicable to a nonparty to be included on the verdict form for fault allocation. In these situations, one needs to remain mindful of the burden the party pleading the nonparty defense must meet. Indeed, the jury in the *Moore* case attributed as much fault to Goodyear as it did to Ford.²⁰³ Thus, one could infer that the jury may have concluded that the tire’s failure played as much of a role in causing the collision and Moore’s death as it was persuaded the design decisions Moore asserted were made by Ford. Perhaps most importantly is the holding that a manufacturer who supplies a product that is to be incorporated into a larger or completed product may have available a viable defense to a design defect claim when this manufacturer supplies the component in compliance with the provided specifications. *Moore* seems to suggest that this would be particularly true when the supplier makes the manufacturer aware of (and/or perhaps suggests) other alternatives, but does not have the ability to provide alternatives. Logic seems to dictate that in these situations it would be more difficult for the component manufacturer not to have exercised reasonable care.

In the second of the three cases in this area, *Myers v. Briggs & Stratton Corp.*,²⁰⁴ the plaintiff alleged that he injured his shoulder trying to start a log splitter. He alleged that the log splitter’s flywheel was underweight.²⁰⁵ The

198. *Id.* at 225.

199. *Id.* (citation omitted).

200. *See id.* at 225-26.

201. *Id.* at 226.

202. *Id.*

203. *Id.* at 207.

204. No. 1:09-cv-0020-SEB-TAB, 2010 WL 1579676 (S.D. Ind. Apr. 16, 2010).

205. *Id.* at *4.

plaintiff did not use an expert to prove the design defect; instead, he relied on testimony from a mechanic as a “fact witness” and a service bulletin issued by the manufacturer.²⁰⁶ The manufacturer filed a motion for summary judgment alleging that the plaintiff did not have necessary expert testimony to prove proximate causation.²⁰⁷ The plaintiff argued that the mechanic’s testimony and service bulletin were sufficient.²⁰⁸ The court disagreed, noting that the service bulletin did not identify any defect in the flywheel and that the mechanic merely testified that he replaced the flywheel.²⁰⁹ Such evidence was insufficient to prove proximate cause.²¹⁰ Expert testimony was required, and the court granted the manufacturer’s motion for summary judgment.²¹¹

The third decision in this area is the *Gardner* case, which we addressed above in connection with the warning defect theory. There, the plaintiff was injured when a shotgun he was holding in his lap discharged.²¹² The plaintiff testified that he placed the shotgun across his lap with the safety engaged as he drove his ATV home from a hunting trip.²¹³ Even though the safety was “on,” he alleged that the shotgun spontaneously fired.²¹⁴ Investigators at the scene confirmed that the safety was on and that the shotgun could be fired despite the safety.²¹⁵ The plaintiff alleged that the shotgun was defectively designed.²¹⁶ Indeed, the court required the plaintiff to show that “(1) the manufacturer placed into the stream of commerce a defectively designed, unreasonably dangerous product, (2) a feasible alternative design existed, and (3) the product defect proximately caused the plaintiff’s injuries.”²¹⁷ The court concluded that the plaintiff wholly failed to show the existence of a feasible safer alternative design.²¹⁸ Accordingly, the court entered summary judgment for the defendant with regard to the plaintiff’s design defect claim.²¹⁹

3. *Manufacturing Defect Theory*.—There have been a handful of important manufacturing defect decisions in recent years,²²⁰ but only one worthy of mention

206. *Id.* at *5.

207. *Id.* at *4.

208. *See id.* at *5.

209. *Id.*

210. *Id.* at *6.

211. *Id.*

212. No. 1:09-cv-0671-TWP-WGH, 2010 WL 3724190, at *1 (S.D. Ind. Sept. 15, 2010).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at *5.

217. *Id.*

218. *Id.*

219. *Id.* at *8.

220. *E.g.*, *Campbell v. Supervalu, Inc.*, 565 F. Supp. 2d 969, 980-81 (N.D. Ind. 2008) (holding that evidence was insufficient as a matter of law to allow jury to decide whether ground beef purchased at a local grocery store caused child’s *E. coli* poisoning). For a more detailed discussion about *Campbell* in the manufacturing defect context, see Alberts et al., *supra* note 24, at 1135-39.

during the 2010 survey period. The plaintiff in *Gardner* also brought a manufacturing defect claim.²²¹ The defendant filed a motion for summary judgment, arguing that the plaintiff had no explanation for the shotgun's alleged spontaneous discharge.²²² The plaintiff offered testimony from an expert and from police investigators at the scene who claimed that the shotgun fired even with the safety engaged.²²³ The court found that this evidence was sufficient to create a question of fact as to whether the shotgun was, in fact, manufactured in a condition that was unexpected and unintended by the manufacturer in that it allegedly fired while the safety was still engaged.²²⁴

E. Regardless of the Substantive Legal Theory

Indiana Code section 34-20-1-1 provides that the IPLA “governs all actions that are: (1) brought by a user or consumer; (2) against a manufacturer or seller; and (3) for physical harm caused by a product; *regardless of the substantive legal theory or theories upon which the action is brought*.”²²⁵ At the same time, however, Indiana Code section 34-20-1-2 provides that the IPLA “shall not be construed to limit any other action from being brought against a seller of a product.”²²⁶

The IPLA is quite clear that for its purposes, “physical harm” means “bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.”²²⁷ It “does not include gradually evolving damage to property or economic losses from such damage.”²²⁸ Thus, reading the statutory language along with the relevant definitions, the Indiana General Assembly appears to have intended that the IPLA provide the exclusive remedy against an entity that the IPLA defines to be a product’s “manufacturer” or a “seller” by a person the IPLA defines to be a “user” or “consumer” of a product when that product has caused sudden and major damage to property, personal injury, or death.

The Indiana General Assembly seemingly has carved out an exception to the IPLA’s exclusive remedy only when the defendant otherwise fits the definition of a “seller” under the IPLA²²⁹ and when the type of harm suffered by the

See also *Gaskin v. Sharp Elec. Corp.*, No. 2:05-CV-303, 2007 U.S. Dist. LEXIS 72347 (N.D. Ind. Sept. 26, 2007) (addressing substantive issues raised in the context of an alleged manufacturing defect). For a detailed analysis of *Gaskin*, see Alberts et al., *supra* note 78, at 1176-80.

221. *Gardner*, 2010 WL 3724190, at *4.

222. *See id.* at *5.

223. *Id.*

224. *Id.*

225. IND. CODE § 34-20-1-1 (2011) (emphasis added).

226. *Id.* § 34-20-1-2.

227. *Id.* § 34-6-2-105(a).

228. *Id.* § 34-6-2-105(b).

229. Recall that for purposes of the IPLA, “[m]anufacturer” . . . means a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a

claimant is not sudden and major property damage, personal injury, or death.²³⁰ Such theories of recovery appear to be the “other” actions the Indiana Code section 34-20-1-2 intended not to limit in the previous section (34-20-1-1). So what theories of recovery against “sellers” are intended by section 34-20-1-2 to escape the IPLA’s exclusive remedy requirement?²³¹ The vast majority (if not all) of those claims would appear to consist of gradually-developing property damage and the type of economic losses typically authorized by the common law of contracts, warranty, or the Uniform Commercial Code (UCC). That would seem the logical interpretation of section 34-20-1-2 because this section seeks not to limit all “other” claims, which, by necessary implication, must mean all claims “other” than the ones identified in the previous section (claims for personal injury, death, and sudden, major property damage).²³²

Thus, when it comes to claims by users or consumers against manufacturers and sellers for physical harm caused by a product, the remedies provided by common law or the UCC should be “merged” into the IPLA-based cause of action.²³³ Claims for economic losses or gradually developing property damage should not be merged into an IPLA claim so long as those actions are maintained

component part of a product before the sale of the product to a user or consumer.” IND. CODE § 34-6-2-77(a). “‘Seller’ . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption.” *Id.* § 34-6-2-136.

230. *See id.* § 34-20-1-2.

231. Indeed, the legal theories and claims to which Indiana Code section 34-20-1-2 appear to except from the IPLA’s reach fall into one of three categories: (1) those that do not involve physical harm (i.e., economic losses that are otherwise covered by contract or warranty law); (2) those that do not involve a “product”; and (3) those that involve entities that are not “manufacturers” or “sellers” under the IPLA.

232. Notwithstanding this conclusion, Indiana courts and some federal courts interpreting Indiana law have not interpreted the IPLA in that way. Indeed, they have allowed claimants in decisions such as *Ritchie v. Glidden Co.*, 242 F.3d 713 (7th Cir. 2001), *Goines v. Fed. Express Corp.*, No. 99-CV-4307-JPG, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. Jan. 8, 2002) (applying Indiana law), and *Kennedy v. Guess, Inc.*, 806 N.E.2d 776 (Ind. 2004), to pursue personal injury common law negligence claims against “sellers” outside the IPLA even when personal injuries were the only alleged harm. *Kennedy* allowed personal injury claims to proceed against the “seller” of a product under common law negligence and Section 400 of the Restatement (Second) of Torts. *Kennedy*, 806 N.E.2d at 784. *Ritchie* allowed personal injury claims to proceed against the “seller” of a product under a negligence theory rooted in Section 388 of the Restatement (Second) of Torts. *Ritchie*, 242 F.3d at 726-27. *Goines* allowed personal injury claims to proceed against the “seller” of a product under a common law negligence duty recognized by a 1993 Indiana decision. *Goines*, 2002 U.S. Dist. LEXIS 5070, at *16-17.

233. That concept is consistent with Indiana law insofar as Indiana courts have not allowed claims for economic losses to be merged into tort actions. Indeed, the economic loss doctrine precludes a claimant from maintaining a tort-based action against a defendant when the only loss sustained is an economic as opposed to a “physical” one. *E.g.*, *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 151 (Ind. 2005); *Fleetwood Enters., Inc. v. Progressive N. Ins. Co.*, 749 N.E.2d 492, 495-96 (Ind. 2001); *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 488-89 (Ind. 2001).

against entities defined by the IPLA as “sellers.”

Several recent Indiana cases such as *Ryan ex rel. Estate of Ryan v. Philip Morris USA, Inc.*,²³⁴ *Fellner v. Philadelphia Toboggan Coasters, Inc.*,²³⁵ *Cincinnati Insurance Cos. v. Hamilton Beach/Proctor-Silex, Inc.*,²³⁶ and *New Hampshire Insurance Co. v. Farmer Boy AG, Inc.*²³⁷ have recognized that actions brought by users and consumers of products against manufacturers and sellers for physical harm caused by an allegedly defective product “merge” into the IPLA and that the IPLA provides the exclusive remedy. A 2010 case, *Myers v. Briggs & Stratton Corp.*,²³⁸ is the latest decision to confirm that premise. In *Myers*, the plaintiff claimed that he injured his shoulder when he was trying to start a log splitter.²³⁹ He did not plead a cause of action under the IPLA, but rather tried to argue that the manufacturer of the log splitter “negligently manufactured” it, that the seller “negligently allowed [it to be sold],” and that it “negligently malfunctioned.”²⁴⁰ The plaintiff claimed that he was not asserting a product liability claim, but rather was asserting a “simple negligence suit.”²⁴¹ The court made quick work of the case, holding that the claims must be brought under the IPLA or not at all because the plaintiff had failed to demonstrate that his claim was anything other than “physical harm caused by a product.”²⁴²

There have been some cases in recent years that have allowed personal injury common law negligence claims to proceed outside the scope of the IPLA, either because the plaintiff was not a “user” or “consumer” of a product, or because the defendant was not a “manufacturer” or a “seller” of a product, or because there was no “physical harm” as the IPLA defines those terms. In those cases, the particular facts presented essentially removed them from the IPLA’s coverage in the first place, and there was, in effect, no real “merger” issue at all.²⁴³

234. No. 1:05 CV 162, 2006 WL 449207 (N.D. Ind. Feb. 22, 2006).

235. No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006).

236. No. 4:05 CV 49, 2006 WL 299064 (N.D. Ind. Feb. 7, 2006).

237. No. IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502 (S.D. Ind. Dec. 19, 2000).

238. No. 1:09-cv-0020-SEB-TAB, 2010 WL 1579676 (S.D. Ind. Apr. 16, 2010).

239. *Id.* at *1.

240. *Id.* at *3.

241. *Id.*

242. *Id.*

243. See, e.g., *Vaughn v. Daniels Co. (W. Va.)*, 841 N.E.2d 1133, 1141-42 (Ind. 2006) (allowing plaintiff’s personal injury common law negligence claims after determining that Vaughn was not a “user” or “consumer” of the allegedly defective product, and therefore, the claims fell outside of the IPLA); *Duncan v. M & M Auto Serv., Inc.*, 898 N.E.2d 338, 342-43 (Ind. Ct. App. 2008) (limiting allegations to negligent repair and maintenance of a product as opposed to a product defect); *Dutchmen Mfg., Inc. v. Reynolds*, 891 N.E.2d 1074, 1081 (Ind. Ct. App. 2008) (allowing plaintiff’s personal injury “common law” negligence claim based upon Section 388 of the Restatement (Second) of Torts after determining that the defendant was not a “manufacturer” or “seller” under the IPLA); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 426 (Ind. Ct. App. 2007) (allowing a common law public nuisance claim to proceed outside the scope of the IPLA because the harm at issue was not “physical” in the form of deaths or injuries suffered as a

There also have been, however, at least two peculiar decisions in recent years holding that claimants who have suffered sudden and major damage to property and/or personal injury may nevertheless maintain actions against product manufacturers and sellers based upon legal theories derived from authority outside the IPLA. Those decisions, *Deaton v. Robinson*²⁴⁴ and *American International Insurance Co. v. Gastite*,²⁴⁵ were issued by a panel of the Indiana Court of Appeals and a federal trial court. Both panels, in effect, refused to “merge” the claims into the IPLA in factual situations clearly governed by the IPLA, thereby placing them at odds with cases such as *Myers, Ryan, Fellner, Cincinnati Insurance*, and *New Hampshire Insurance*. The *Gastite* decision may be of limited value, however, because the court relied on a case decided four years before the Indiana General Assembly enacted the 1995 amendments to the IPLA to add the “regardless of the substantive legal theory” language.²⁴⁶

In 2009, the Indiana Supreme Court twice had the opportunity to address this issue in *Collins v. Pfizer, Inc.*,²⁴⁷ and *Kovach v. Caligor Midwest*,²⁴⁸ but declined to do so both times.²⁴⁹

result of gun violence, but rather the increased availability or supply of handguns); *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522, 536-37 (Ind. Ct. App. 2004) (allowing plaintiff’s personal injury common law negligence claims under Section 392 of the Restatement (Second) of Torts after finding that the defendant at issue was neither a “manufacturer” or a “seller” as the IPLA defines the terms).

244. 878 N.E.2d 499 (Ind. Ct. App. 2007). The *Deaton* court indicated that liability could be imposed in a personal injury case against the manufacturer of an allegedly defective black powder rifle pursuant to both the IPLA and Section 388 of the Restatement (Second) of Torts. *See id.* at 501-03.

245. No. 1:08-cv-1360-RLY-DML, 2009 U.S. Dist. LEXIS 41529 (S.D. Ind. May 14, 2009). In *Gastite*, the court refused to merge separate breach of express and implied warranty claims with IPLA-based claims against a manufacturer even though the harm suffered was property damage caused by a house fire. *Id.* at *9-11.

246. In a footnote, the *Gastite* court wrote that “[a]lthough the IPLA provides a single cause of action for a user seeking to recover in tort from a manufacturer for harm caused by a defective product, a plaintiff may maintain a separate cause of action under a breach of warranty theory.” *Id.* at *7 n.1 (internal citation omitted). The authority cited for that statement is *Hitachi Construction Machine Co. v. AMAX Coal Co.*, 737 N.E.2d 460, 465 (Ind. Ct. App. 2000). Reliance on *Hitachi* to support that point is tenuous at best, though, because the authority cited in *Hitachi* on that point is from 1991, four years before the Indiana General Assembly changed the law when it enacted the 1995 amendments to the IPLA to add the “regardless of the substantive legal theory” language. The case upon which the *Hitachi* panel relied is *B&B Paint Corp. v. Shrock Manufacturing, Inc.*, 568 N.E.2d 1017, 1020 (Ind. Ct. App. 1991).

247. No. 1:08-cv-0888-DFH-JMS, 2009 U.S. Dist. LEXIS 3719 (S.D. Ind. Jan. 20, 2009).

248. 913 N.E.2d 193 (Ind. 2009), *reh’g denied*.

249. For a more detailed discussion about *Collins* and *Kovach* as those cases relate to this point, see Alberts et al., *supra* note 25, at 906-08.

II. STATUTES OF LIMITATION AND REPOSE

The IPLA contains a statute of limitation and a statute of repose for product liability claims. Indiana Code section 34-20-3-1 provides:

(a) This section applies to all persons regardless of minority or legal disability. Notwithstanding . . . [Indiana Code section] 34-11-6-1, this section applies in any product liability action in which the theory of liability is negligence or strict liability in tort.

(b) Except as provided in section 2 of this chapter, a product liability action must be commenced:

(1) within two (2) years after the cause of action accrues; or

(2) within ten (10) years after the delivery of the product to the initial user or consumer.

However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.²⁵⁰

This year's survey period produced a key decision involving the statute of repose. In *Florian v. Gatx Rail Corp.*,²⁵¹ the plaintiff was injured when he drove his car into a black-painted railroad car at night.²⁵² The railroad car was manufactured in 1975, but it had been repainted sometime during the preceding ten years.²⁵³ The plaintiff brought a product liability claim, alleging that the railroad car was defective because it was painted black.²⁵⁴ The court concluded that the statute of repose barred the plaintiff's claims.²⁵⁵ The statute of repose begins to run "from the time the product is 'delivered from the manufacturer . . . to the first consuming entity.'"²⁵⁶ However, if an allegedly defective component is incorporated into the product after the initial delivery, the statute of repose

250. IND. CODE § 34-20-3-1 (2011). Recent decisions have used the IPLA's statute of repose to dispose cases as untimely. *E.g.*, *Campbell v. Supervalu, Inc.*, 565 F. Supp. 2d 969, 977 (N.D. Ind. 2008); *C.A. v. Amli at Riverbend, L.P.*, No. 1:06-cv-1736-SEB-JMS, 2008 U.S. Dist. LEXIS 2558, at *8 (S.D. Ind. Jan. 10, 2008). For more detailed discussions about these cases, see Alberts et al., *supra* note 24, at 1147-51. In addition, product liability cases involving asbestos products have a unique statute of limitations. See IND. CODE § 34-20-3-2(a). For a discussion of the asbestos-related statute of repose, see generally *Ott v. AlliedSignal, Inc.*, 827 N.E.2d 1144 (Ind. Ct. App. 2005). There were no key cases decided during the 2010 survey period involving the asbestos statute of repose.

251. 930 N.E.2d 1190 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 828 (Ind. 2010).

252. *Id.* at 1192-93.

253. See *id.* at 1201.

254. See *id.*

255. *Id.*

256. *Id.* at 1201-02 (quoting *Ferguson v. Modern Farm Sys., Inc.*, 555 N.E.2d 1379, 1386 (Ind. Ct. App. 1990)).

starts anew.²⁵⁷ The plaintiff claimed that the new “component” was the recent repainting of the railcar.²⁵⁸ The court disagreed and found that repainting did not constitute a new component; rather, it was routine maintenance.²⁵⁹ Accordingly, the product liability claim was barred by the ten-year statute of repose.²⁶⁰

III. FAULT ALLOCATION

Indiana Code section 34-20-8-1(a) provides that “[i]n a product liability action, the fault of the person suffering the physical harm, as well as the fault of all others who caused or contributed to cause the harm, shall be compared by the trier of fact in accordance with . . . [the Indiana Comparative Fault Act].”²⁶¹ The Indiana Comparative Fault Act (ICFA), Indiana Code section 34-51-2-7, requires the finder of fact in an action based upon fault to determine the percentage of fault of the claimant, the defendant, and any non-party.²⁶² “In assessing percentage of fault,” the ICFA states that the fact-finder must “consider the fault of all persons who caused or contributed to cause the alleged injury.”²⁶³

In this context, Indiana practitioners should be aware of *Green v. Ford Motor Co.*²⁶⁴ There, plaintiff Green claimed to have suffered injuries in an accident involving a 1999 Ford Explorer he was driving, and he alleged that those injuries were enhanced by a defective and unreasonably dangerous vehicle restraint system that Ford designed.²⁶⁵ The *Green* case squarely addressed the issue of fault allocation in the context of a design defect case in which an operative method of demonstrating liability is based upon liability for “enhanced injuries” (sometimes also referred to generally as “crashworthiness”), even when the manufacturer is not liable for the events that caused the underlying accident. Judge McKinney described the crashworthiness doctrine in Indiana as follows:

In a typical crashworthiness case, the first collision causes the accident itself—for example, when the plaintiff’s vehicle is rear-ended by another driver. The second collision—namely, when the plaintiff strikes the interior of the plaintiff’s vehicle and is injured—causes the plaintiff’s enhanced injuries. . . . “Under the doctrine of crashworthiness a motor vehicle manufacturer may be liable in negligence or strict liability for injuries sustained in a motor vehicle accident where a manufacturing or design defect, though not the cause of the accident, caused or enhanced the injuries.” In such a case, the plaintiff bears the burden of proving that the defective condition of the product at issue proximately caused the

257. *Id.* at 1202.

258. *Id.* at 1201.

259. *Id.* at 1201-02.

260. *Id.* at 1202.

261. IND. CODE § 34-20-8-1(a) (2011).

262. *Id.* § 34-51-2-7(b)(1).

263. *Id.*

264. No. 1:08-cv-0163-LJM-TAB, 2010 WL 2673926 (S.D. Ind. June 30, 2010).

265. *Id.* at *1.

plaintiff's enhanced injuries. Specifically, the plaintiff must "demonstrate that a feasible, safer, more practicable product design would have afforded better protection." The defendant is not responsible for any of the plaintiff's injuries that resulted from the accident itself and not from the alleged defects in the defendant's products.²⁶⁶

Pursuant to Indiana Code section 34-20-8-1, Ford intended to argue at trial that Green was negligent in causing the underlying accident, and Green moved in limine to exclude all evidence of his alleged contributory fault.²⁶⁷ Green claimed that because a crashworthiness claim related solely to his so-called "enhanced" injuries, evidence of his fault in causing the underlying accident was irrelevant and prejudicial.²⁶⁸ Accordingly, Green moved to certify the question "whether, in a crashworthiness case alleging enhanced injuries under the [I]PLA, the finder of fact shall apportion fault to the person suffering physical harm when that alleged fault relates to the cause of the underlying accident."²⁶⁹

Judge McKinney agreed that the question should be referred to the Indiana Supreme Court because the "critical task" in enhanced injury cases is to define the "physical harm" at issue and to determine which parties caused or contributed to that harm.²⁷⁰ Because in crashworthiness cases, the physical harm at issue is the enhancement of the injuries allegedly caused by a defective product design, it is unclear whether a plaintiff who negligently causes the underlying accident also causes the so-called enhanced injuries.²⁷¹ According to Judge McKinney, Indiana Code 34-20-8-1 does not answer that question; it "merely instructs that, if the plaintiff in a products liability action proximately causes at least some of the plaintiff's injuries, then the jury is required to apportion fault under the Indiana Comparative Fault . . . [Act]."²⁷² As a result, Judge McKinney certified the question to the Indiana Supreme Court phrased as follows: "whether a plaintiff's contributory negligence in causing the first collision is also, as a matter of Indiana law, 'fault' that the jury shall apportion under Indiana Code section 34-20-8-1."²⁷³ The Indiana Supreme Court accepted the question and heard oral

266. *Id.* (internal citations omitted).

267. *Id.* at *2.

268. *Id.* Green contended that "the only relevant inquiry . . . [was] whether Ford's negligent design of the 1999 Ford Explorer Sport's restraint system caused injuries that Green would not have otherwise suffered with a properly designed restraint system." *Id.* "In other words," the court wrote, "Green asserts that his alleged negligence is irrelevant because only a product's defective design can cause 'enhanced injuries.'" *Id.*

269. *Id.*

270. *Id.* at *3.

271. *See id.* at *2.

272. *Id.*

273. *Id.* In certifying the question, Judge McKinney wrote that "other jurisdictions that have addressed this issue have reached differing results", noting further as follows:

The law is uncertain; no Indiana court has written on the issue and there is a split of authority in other states. Additionally, the issue concerns a matter of vital public

argument on December 9, 2010.²⁷⁴

CONCLUSION

The 1995 amendments to the IPLA have been in effect now for fifteen years. Although there are still some areas where courts are interpreting key provisions differently, Indiana jurisprudence now appears to be settling itself, and the collective group of product liability decisions over the last ten years or so is starting to provide a fairly sturdy foundation upon which practitioners may build their product liability claims and defenses.

concern; indeed, many courts have answered the question—either affirmatively or negatively—as a matter of public policy. Moreover, this issue will arise in any crashworthiness case where the negligence of the plaintiff or any other third party in causing the underlying accident is at issue. Finally, the Court is of the opinion that Green’s alleged negligence in causing the underlying accident would become outcome determinative when, as is the case here, a plaintiff may not recover if he or she is fifty percent at fault.

Id. at *3 (internal citation omitted).

274. Green v. Ford Motor Co., 931 N.E.2d 377 (Ind. 2010).

2010 SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

CHARLES M. KIDD*

INTRODUCTION

During this survey period, a very diverse collection of subjects merited attention and review. Notably, a number of the cases decided by the supreme court were styled as “Anonymous” opinions. Opinions carrying the “Anonymous” caption can (and as will be seen) have wide application within the Indiana bar. Most people will immediately appreciate that disciplinary cases resulting in a lawyer’s permanent disbarment from the practice of law are not usually the result of a single bad act, but rather, the end product of a long series of actions that usually harm both the public and the bar at large. One example is *Matter of Perrello*,¹ wherein the lawyer had a long and troubling history of misconduct, including a lengthy prior suspension and a criminal contempt action before his disbarment. In isolation, a particular sanction in one case is not indicative of a trend or change in legal philosophy, and nothing in this Article suggests that such a momentous event is occurring. As a general matter however, “Anonymous” opinions indicate that the respondent lawyer who is the actual subject of the disciplinary action has committed some misconduct warranting sanction. In these instances, the lawyers received one of the lowest levels of rebuke, the private reprimand.² Something about the misconduct involved, however, is of sufficient note to warrant publication of the facts and the supreme court’s analysis for the broader benefit of the bar and public. Hopefully, through the review in this Article, the reader will develop some appreciation for the significant ethical lesson to be drawn from the disciplinary actions reviewed.

I. WHAT’S THE PLURAL OF ANONYMOUS?

In August 2010, the Indiana Supreme Court handed down its opinion in the case identified as *In re Anonymous*.³ In that case, a woman identified as “AB” had consulted with the respondent lawyer about difficulties she was having in her marriage.⁴ The respondent lawyer represented an organization at which AB was

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1. 394 N.E.2d 127 (Ind. 1979) (ordering disbarment for the attorney). In a subsequent case, *Matter of Perrello*, 386 N.E.2d 174 (Ind. 1979), Perrello was incarcerated for contempt of the supreme court for continuing to practice law while he was suspended. *Id.* at 179-80.

2. IND. ADMISSION & DISCIPLINE R. 23, § 3(a). This provision recites the list of possible sanctions that can be imposed by the Indiana Supreme Court for professional misconduct by a lawyer.

3. 932 N.E.2d 671 (Ind. 2010).

4. *Id.* at 672.

an employee, which is presumably how their acquaintance began.⁵ AB confided in the respondent that she and her husband had been involved in a domestic dispute in which the police were called to intervene; she further confided that her husband was prepared to accuse AB of threatening to harm him.⁶ The respondent referred AB to a lawyer in her law firm to represent her in a marriage dissolution action. AB hired the referral lawyer and began a marriage dissolution action. Shortly thereafter, AB and her husband reconciled, and the marriage dissolution case was dismissed.⁷ Some weeks later, the respondent was socializing with two friends—one of whom was a mutual friend of AB's—and the respondent lawyer discussed AB's situation in the conversation. The respondent asked the friend to have AB contact her to discuss her situation.⁸ Upon learning of the respondent's out-of-office revelation of AB's prior communications, AB became upset and filed a grievance with the Indiana Supreme Court Disciplinary Commission. This disciplinary action ensued, and the respondent lawyer was charged with a violation of rule 1.9(c)(2)⁹ of the Indiana Rules of Professional Conduct.¹⁰

The case was tried to a hearing officer, and the respondent was found to have violated the rule as charged.¹¹ In its discussion, the supreme court noted that this rule and other rules of professional conduct were interrelated.¹² Specifically, the court looked to rule 1.6, which governs a lawyer's duties regarding the confidentiality of information as it relates to current clients.¹³ The primary provision is in subsection (a), which states that "[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."¹⁴ The court also discussed the applicability of rule 1.18, which governs a lawyer's duties to prospective clients. There, "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client."¹⁵ Furthermore, "[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 673.

9. Rule 1.9(c)(2) provides, in pertinent part, that "[a] lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client." IND. PROF'L CONDUCT R. 1.9(c)(2).

10. *Anonymous*, 932 N.E.2d at 673.

11. *Id.*

12. *Id.*

13. *See* IND. PROF'L CONDUCT R. 1.6.

14. IND. PROF'L CONDUCT R. 1.6(a). Paragraph (b) allows disclosure under certain specified conditions, none of which were present in this case.

15. IND. PROF'L CONDUCT R. 1.18(a).

or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.”¹⁶

The respondent’s first argument was that AB had given her the information for the purpose of obtaining personal rather than professional help.¹⁷ She argued that AB did not communicate her interest in obtaining a lawyer referral until a later telephone conversation. The second conversation, however, was not long after the first communication. The court found that AB’s status became that of prospective client (under rule 1.18) at the time of the second communication, “if not before.”¹⁸ AB became a client of the firm immediately thereafter, and the information was highly relevant to the representation.¹⁹ The respondent lawyer also presented evidence that AB had revealed this information to persons other than her, but the court observed that such disclosures did not relieve the respondent lawyer from her obligations under the rules of professional conduct.²⁰ Concisely, the court stated, “An attorney has a duty to prospective, current, and former clients to scrupulously avoid revelation of such information, even if, as may have been the case here, the attorney is motivated by personal concern for the client.”²¹ The court thereafter ordered a private reprimand for this respondent.

In the next “Anonymous” opinion,²² an Indiana lawyer agreed to serve as local counsel for a lawyer from Kentucky who was not properly admitted to practice in Indiana.²³ In the underlying litigation, a Kentucky resident was injured in a fall at an Indiana restaurant.²⁴ The injured party hired Kentucky lawyer John Redelberger to pursue the claim. Redelberger did not, however, pursue temporary admission as required by Indiana Admission and Discipline Rule 3.²⁵ Nevertheless, Redelberger appeared in the case, signed and served

16. IND. PROF’L CONDUCT R. 1.18(b).

17. *Anonymous*, 932 N.E.2d at 674.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 675.

22. *In re Anonymous*, 932 N.E.2d 1247 (Ind. 2010) (per curiam).

23. *Id.* at 1248.

24. *Id.*

25. *Id.* Section 2(a) of Indiana Admission and Discipline Rule 3 deals with temporary admission on petition and states as follows:

(a) *Requirements for Temporary Admission on Petition.* The Supreme Court, the Court of Appeals, the Tax Court, or a trial court, in the exercise of discretion, may permit a member of the bar of another state or territory of the United States, or the District of Columbia, not admitted pursuant to Rule 21, to appear in any particular proceeding, only if the court before which the attorney wishes to appear determines that there is good cause for such appearance and that each of the following conditions is met:

(1) A member of the bar of this state has appeared and agreed to act as co-counsel.

(2) The attorney is not a resident of the state of Indiana, regularly employed in the state of Indiana, or regularly engaged in business or professional activities in the

state of Indiana.

(3) The attorney has made payment to the Clerk of the Supreme Court an annual registration fee in the amount set forth in Admission and Discipline Rule 2(b), accompanied by a copy of the Verified Petition for Temporary Admission that the attorney intends to file pursuant to subdivision (4) below. Upon receipt of the registration fee and petition, the Clerk of the Supreme Court will issue a temporary admission attorney number and payment receipt to the attorney seeking admission. If the attorney's verified petition for temporary admission is thereafter denied, the attorney shall provide a copy of the order denying temporary admission to the Clerk of the Supreme Court, and the Clerk shall issue a refund of the registration fee.

(4) The attorney files a verified petition, co-signed by co-counsel designated pursuant to subdivision (a)(1), setting forth:

(i) The attorney's residential address, office address, office telephone number, electronic mail address, and the name and address of the attorney's law firm or employer, if applicable;

(ii) All states or territories in which the attorney has ever been licensed to practice law, including the dates of admission to practice and any attorney registration numbers;

(iii) That the attorney is currently a member in good standing in all jurisdictions listed in (ii);

(iv) That the attorney has never been suspended, disbarred or resigned as a result of a disciplinary charge, investigation, or proceeding from the practice of law in any jurisdiction; or, if the attorney has been suspended, disbarred or resigned from the practice of law, the petition shall specify the jurisdiction, the charges, the address of the court and disciplinary authority which imposed the sanction, and the reasons why the court should grant temporary admission . . . [notwithstanding] prior acts of misconduct;

(v) That no disciplinary proceeding is presently pending against the attorney in any jurisdiction; or, if any proceeding is pending, the petition shall specify the jurisdiction, the charges and the address of the disciplinary authority investigating the charges. An attorney admitted under this rule shall have a continuing obligation during the period of such admission promptly to advise the court of a disposition made of pending charges or the institution of new disciplinary proceedings;

(vi) A list of all proceedings, including caption and cause number, in which either the attorney, or any member of a firm with which the attorney is currently affiliated, has appeared in any of the courts of this state during the last five years by temporary admission.

(vii) Absent good cause, repeated appearances by any person or by members of a single law firm pursuant to this rule shall be cause for denial of the petition. A demonstration that good cause exists for the appearance shall include at least one of the following:

(a) the cause in which the attorney seeks admission involves a complex field of law in which the attorney has special expertise,

answers to interrogatories, and took depositions of witnesses in Indiana. Redelberger also appeared in court on behalf of the client.²⁶ It was after this appearance that the presiding judge pointed out to the respondent lawyer that Redelberger had not properly been admitted in this state. After this, the respondent lawyer provided Redelberger with a copy of the Indiana rule on temporary admission, but neither the respondent or Redelberger followed up on the process.²⁷

In its discussion, the court noted that its authority to regulate the practice of law is plenary in this state under the Indiana Constitution.²⁸ It was also necessary for the court to know who was practicing law in Indiana so that it could properly exercise that authority.²⁹ The court then discussed the procedure for obtaining temporary admission. Before an attorney can appear in an Indiana court, he or she must pay a temporary admission fee and obtain a temporary admission attorney number from the clerk of the Indiana Supreme Court.³⁰ Thereafter, the lawyer may petition for temporary admission with the court. If a lawyer fails to seek temporary admission, he or she can be automatically excluded from the practice of law from all actions in the state.³¹ An out-of-state lawyer can also be charged with the unauthorized practice of law. The court also pointed out that the role of the Indiana attorney is not a mere matter of form, noting that

[t]he participation of Indiana co-counsel in the temporary admission

(b) there has been an attorney-client relationship with the client for an extended period of time,

(c) there is a lack of local counsel with adequate expertise in the field involved,

(d) the cause presents questions of law involving the law of the foreign jurisdiction in which the applicant is licensed, or

(e) such other reason similar to those set forth in this subsection as would present good cause for the temporary admission.

(viii) A statement that the attorney has read and will be bound by the Rules of Professional Conduct adopted by the Supreme Court, and that the attorney consents to the jurisdiction of the State of Indiana, the Indiana Supreme Court, and the Indiana Supreme Court Disciplinary Commission to resolve any disciplinary matter that might arise as a result of the representation.

(ix) A statement that the attorney has paid the registration fee to the Clerk of the Supreme Court in compliance with subdivision (a)(3) of this rule, together with a copy of the payment receipt and temporary admission attorney number issued by the Clerk of the Supreme Court pursuant to subdivision (3).

IND. ADMISSION & DISCIPLINE R. 3, § 2(a).

26. *Anonymous*, 932 N.E.2d at 1248.

27. *Id.*

28. *Id.* (citing IND. CONST. art. VII, § 4).

29. *Id.* at 1249.

30. IND. ADMISSION & DISCIPLINE R. 3, § 2(a)(3).

31. *See id.*

process is of vital importance to this Court's ability to supervise out-of-state attorneys practicing in this state. This is no minor or perfunctory duty. Not all attorney seeking temporary admission will be granted the privilege of practicing in Indiana. Thus, an out-of-state attorney may seek temporary admission in an Indiana court only if a member of the bar of this state has appeared and agreed to act as co-counsel. Indiana co-counsel must co-sign the out-of-state attorney's petition for temporary admission, which must include the attorney's temporary admission and a receipt showing that the attorney has paid the temporary admission fee. Indiana co-counsel must also sign all briefs, papers and pleadings in the case and is jointly responsible for them. This signature constitutes a certificate that, to the best of co-counsel's knowledge, information and belief, there is good ground to support the document. Indiana co-counsel is subject to discipline if the out-of-state attorney fails to satisfy the requirements of the rule governing temporary admission.³²

The court also observed that the clerk of the supreme court had issued more than six hundred notices of automatic exclusion at the time of the opinion in 2010—the point being that the need for the automatic exclusions would be nearly eliminated if Indiana co-counsel complied with their ethical duty to ensure that out-of-state lawyers complied with Indiana Admission and Discipline Rule 3.³³ The court then approved and accepted the proposed private reprimand offered by the parties.³⁴

In a third “Anonymous” opinion, the court imposed a private reprimand on a lawyer who rebuffed an incarcerated client's request for materials out of his file.³⁵ In that case, a criminal defendant was charged with three counts of auto theft, and the respondent lawyer was appointed to serve as his public defender.³⁶ During the representation, the client sent the lawyer a letter asking for a copy of the State of Indiana's responses to his discovery request. The client stated a willingness to sign a plea agreement if the State would allow his sentence in the instant case to run concurrently with a sentence he was then serving.³⁷ The lawyer reviewed the discovery with the client but did not provide the client a copy.³⁸ A plea agreement was successfully consummated shortly thereafter. The client went to jail and did not pursue an appeal. The respondent argued—and the supreme court agreed—that the respondent reasonably believed that the client's prior request for a copy of these materials was no longer an issue at that point.³⁹

Several weeks later, by letter, the client asked for a copy of the discovery

32. *Anonymous*, 932 N.E.2d at 1249 (internal citations omitted).

33. *Id.* at 1250.

34. *Id.*

35. *In re Anonymous*, 914 N.E.2d 265, 267 (Ind. 2009).

36. *Id.* at 266.

37. *Id.*

38. *Id.*

39. *Id.*

materials and copies of “all other court documents.”⁴⁰ There was no other indication as to why he wanted these materials. The respondent sent a letter back to the client advising him that his representation had ended on the date of sentencing and that he felt no further professional obligation to the client. He also advised the client he was “not going to waste a lot of needless time and money sending stuff that’s irrelevant for what . . . [the client was] obviously planning to do . . . filing some sort of post-conviction relief petition and all the litigation that goes with it.”⁴¹ He also sent a copy of a court of appeals decision in a post-conviction relief case and suggested that the client “read it about 14 times before . . . [filing] any sort of PCR petition.”⁴²

After the client filed a grievance, the disciplinary commission initiated disciplinary action against the respondent and charged him with violating rule 1.16(d) of the Indiana Rules of Professional Conduct.⁴³ Essentially, the rule spells out a lawyer’s duties to a client upon the termination of the formal attorney-client relationship. The respondent lawyer and the commission tried their cases to the hearing officer, who concluded that the respondent had violated rule 1.16(d) by failing to provide copies of the discovery requests to the client.⁴⁴ However, the officer also concluded that the commission had failed to prove a violation of the rule regarding the other documents because the client’s request was too vague to be able to ascertain what he was seeking.⁴⁵ The hearing officer recommended that the respondent lawyer receive a private reprimand for this violation, and the commission petitioned the supreme court to review the decision.⁴⁶

In addition to the rule violation, the court found that a provision of the Indiana Code was instructive on this subject.⁴⁷ The court held that “[n]either the

40. *Id.*

41. *Id.*

42. *Id.*

43. The rule provides that

[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

IND. PROF’L CONDUCT R. 1.16(d).

44. *Anonymous*, 914 N.E.2d at 266.

45. *Id.*

46. *Id.*

47. *Id.* at 267. The relevant statute provides:

If, on request, an attorney refuses to deliver over money or papers to a person from whom or for whom the attorney has received them, in the course of the attorney’s professional’s employment, the attorney may be required, after reasonable notice, on motion of any party aggrieved, by an order of the court in which an action, if any, was prosecuted or if an action was not prosecuted, by the order of any court of record, to

[r]ule nor the [s]tatute requires an attorney to honor all demands from former clients for copies of everything from their files.”⁴⁸ In this case, the question turned on the issue of protecting the client’s interests. The client did not reveal why he wanted the material, but the respondent assumed he wanted them to file a post-conviction relief action.⁴⁹ As such, the respondent’s provision of these documents was “tied to protecting . . . [the client’s] legal interests”⁵⁰ irrespective of whether the respondent lawyer thought there was any merit to that course of action. The supreme court concluded that on these facts, the respondent had a duty to provide the information specifically requested by the client in anticipation of his filing of a future action. His intentional failure to do so warranted sanction for violating the rule as charged.⁵¹ In mitigation, however, the court noted that the respondent lawyer had no prior history of disciplinary action in more than twenty-five years of practice, and the client had no real complaint about the quality of the services provided in the respondent’s underlying representation.⁵² The court concluded, however, that a private reprimand was adequate to conclude this disciplinary action.

II. LAWYER ADVERTISING

In October 2010, the supreme court published its order amending the Indiana Rules of Professional Conduct that revealed the court’s new version of the lawyer advertising rules contained within these rules. With a promulgation date of January 1, 2011, the rules replaced prior versions of rules 7.1 through 7.5. For the first time, the rules include commentary inserted by the drafters to give members of the bar some guidance in their interpretation of the rules when creating their advertising. The rules also include new provisions that include a ban on directing targeted communications to prospective clients in personal injury cases for thirty days after the occurrence of the injury, as well as some relaxation of the rules governing trade names for law firms. A complete recitation of the new rules is attached to this Article as “Appendix A” for ease of reference. As of the time of this Article, there are no new cases to review under the new rules, so the rules are presented without additional comment in this year’s Article.

III. UNAUTHORIZED PRACTICE OF LAW

Perhaps the leading case in the last few years was decided recently in *State*

deliver the money or papers within a specified time, or show cause why the attorney should not be punished for contempt.

IND. CODE § 33-43-1-9 (2011).

48. *Anonymous*, 914 N.E.2d at 267.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

of *Indiana ex rel. Indiana State Bar Ass'n v. United Financial Systems Corp.*⁵³ This was an original action begun by the Indiana State Bar Association alleging that United Financial ("UFSC") had engaged in the unauthorized practice of law.⁵⁴ After a three-day hearing, the hearing officer issued extensive findings of fact and conclusions of law finding, inter alia, that UFSC had indeed engaged in unauthorized practice.⁵⁵ UFSC is an insurance marketing agency that began marketing estate planning services, including wills and trusts, in the mid-1990s. Typically, a sales representative would meet with the client and gain access to his or her financial data.⁵⁶ The representative would then tout UFSC's team of tax strategists and independent attorneys in selling its services to clients. In reality, UFSC had no tax strategists, and the level of independence of its attorneys was contested.⁵⁷ Packages that were sold were routed to UFSC's panel attorneys. The court determined that irrespective of whether the attorneys could truly be said to be independent, the arrangement presented a troubling picture.⁵⁸ Notably, products were sold to clients without any prior attorney involvement, and the operation tended to emphasize sales and revenue over objective, disinterested advice. In the end, the supreme court determined that UFSC had engaged in the unauthorized practice of law.⁵⁹

Of particular note in the opinion is the court's discussion of the available remedies. Under Admission and Discipline Rule 24,⁶⁰ the costs and expenses associated pursuit of these unauthorized practice cases is to be borne by the losing party. The Indiana State Bar Association argued that the language of the rule also included attorneys' fees. In its discussion, the court found that rule 24 was not so broad in scope as to permit the award of attorney fees as requested by the association.⁶¹ The court, however, noted that Indiana Code section 34-52-1-1 might be used to grant an award of attorney fees in "any civil action" where a party brings a defense that is "frivolous, unreasonable, or groundless."⁶² In addition, the association asked that UFSC be required to disgorge the fees they were paid for services that had been determined to be the unauthorized practice of law.⁶³

In its conclusion, the court enjoined UFSC from engaging in any of the acts

53. 926 N.E.2d 8 (Ind. 2010) (per curiam).

54. *Id.* at 10.

55. *See id.* at 11.

56. *Id.*

57. *Id.*

58. *See id.* at 12-13.

59. *Id.* at 15.

60. The relevant portion of this rule provides, "The costs and expenses incurred by such hearing shall be borne by the losing party." IND. ADMISSION & DISCIPLINE R. 24. This is the only such provision in the rule.

61. *See United Fin. Sys. Corp.*, 926 N.E.2d at 15.

62. *Id.* at 16.

63. *Id.*

that it determined constituted the unauthorized practice of law.⁶⁴ In addition, UFSC was ordered to provide a copy of the court's order to all persons who could be identified that had purchased estate plans since 1995.⁶⁵ The purpose of this order was to allow the purchasers to make an informed decision as to whether to keep their existing estate plan. In addition, those purchasers were to be advised of their right to a refund of all sums paid for the purchase of an estate plan. The case was also remanded for a determination as to how much of an award of attorneys' fees was appropriate as a result of UFSC's assertion of baseless arguments in the underlying case. This was also to include the reimbursement of costs.⁶⁶

IV. ATTORNEYS' FEES

In *Matter of Lauter*,⁶⁷ the respondent and his law firm were hired to handle an employment discrimination claim and entered into a written agreement with the client. The agreement provided for a contingency fee based agreement on the amount recovered of one-third of the amount recovered before trial or forty percent of the amount otherwise.⁶⁸ The agreement also called for an engagement fee of \$750, which the client paid up front. Moreover, the agreement contained a hand written notation at the bottom of the agreement, initialed by the client, calling for "an additional retainer fee payable if the client and firm agree to file federal court litigation."⁶⁹ The lawyer and client had agreed to leave the amount of the additional retainer undetermined until the respondent had decided to advise the client whether or not to proceed to federal court.⁷⁰ The respondent lawyer testified that he believed a typical engagement fee for a case of that type was about five thousand dollars (irrespective of whether federal litigation is involved) and that he charged an initial fee of \$750 to allow a claimant whose case goes only through the Equal Employment Opportunity Commission (EEOC) proceeding to pay less than a client whose case goes on to the United States District Court.⁷¹

The lawyer later charged the client and received a payment of \$4400 that included a \$150 filing fee, after having determining that the client's case had enough merit for formal filing in the federal court.⁷² Ultimately, the client recovered \$75,000 from the discrimination defendant, and the respondent lawyer's fee from that amount was \$30,000. This amount included the \$750 engagement fee, the \$4250 additional retainer and a one-third contingent fee of

64. *Id.* at 19.

65. *Id.*

66. *Id.* at 20.

67. 933 N.E.2d 1258 (Ind. 2010) (per curiam).

68. *Id.* at 1260.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

\$25,000.⁷³

The respondent lawyer was charged with violating rules 1.5(b), 1.5(c),⁷⁴ and 1.8(a)⁷⁵ in relation to his fee arrangement with the client. In essence, the lawyer is required to communicate the basis or rate of the fee to the client before the representation starts or within a reasonable time thereafter.⁷⁶ The respondent testified that at the outset of the representation, he does not normally know enough about the merits of the case to make a specific fee agreement until he has conducted some investigation of the claim and its merits.⁷⁷ He testified that after many years of practice in this area, that he believed the “industry standard” fee

73. *Id.* at 1261.

74. Rule 1.5 provides in relevant part:

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

IND. PROF'L CONDUCT R. 1.5(b)-(c).

75. Rule 1.8(a) provides,

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

IND. PROF'L CONDUCT R. 1.8(a).

76. *See* IND. PROF'L CONDUCT R. 1.5(b).

77. *Lauter*, 933 N.E.2d at 1261.

was about \$5000 if the case was not resolved before taking it to federal court.⁷⁸

In its discussion, the court noted that the lawyer had decades of experience in pricing these matters, a skill that most clients would lack.⁷⁹ The court found that

[i]n such circumstances, when a fee agreement gives no disclosure or guidance as to how an initially unspecific fee component will be set, the danger of client confusion and lawyer overreaching is apparent. We do not suggest that [the] [r]espondent is guilty of overreaching in his dealings with his clients. . . . The problem in this case is that [the] [r]espondent gave no indication to the client of what the additional retainer would be or how it would be determined.⁸⁰

The court provided guidance to the bar by noting that this respondent could have complied with the rule by: “(1) stating the amount of the additional retainer the client would owe if the case went to court; (2) disclosing a range for the additional retainer with an upper limit; or (3) providing a method by which the additional retainer would be calculated.”⁸¹

Because of this failure, the respondent was found to have violated rule 1.5(b). Furthermore, the commission alleged—and the court found—that this violation led to a derivative violation of rule 1.5(c), which requires contingent fee agreements to be in writing.⁸² The requirement of the writing serves a valuable purpose of protecting the public, and the court reasoned that the respondent’s fee agreement with this client would have benefitted from formal memorialization. The court noted that

[t]he term “retainer” might imply to a lawyer that it is to be in addition to the contingent fee, and this is the way [the] [r]espondent treated it. But one purpose of this rule is to protect the lay client who is unfamiliar with the legalese and industry standards regarding attorney fees. Because the [c]ontract fails to disclose adequately the method by which the contingent fee was to be calculated, we conclude that respondent violated Rule 1.5(c).⁸³

In this way, the consumer protection aspects of the attorney discipline system operate to protect clients, irrespective of their level of sophistication.

Finally, the court turned to the question of whether the respondent had violated rule 1.8(a). The court noted that it had previously found lawyers to have violated this rule where they changed the terms of a fee agreement to be more financially advantageous to the lawyer.⁸⁴ Although the court recognized that the

78. *Id.*

79. *Id.*

80. *Id.* at 1261-62.

81. *Id.* at 1262.

82. *See id.*

83. *Id.*

84. *Id.* at 1263. The court cited the noteworthy case of *Matter of Hefron*, 771 N.E.2d 1157

respondent did not follow the safeguards attendant to the rule, it held that the violation of rule 1.5(b) covered the actual misconduct by the respondent and declined to find that the lawyer also engaged in a conflict of interest (as alleged by the commission). For this misconduct, the respondent received a public reprimand.⁸⁵

(Ind. 2002) (per curiam), where a lawyer initially charged a client an hourly fee until he recognized that a substantial amount of cash was involved. *Id.* at 1158. He then insisted that the client pay him a contingent fee. The lawyer received a lengthy suspension for his misconduct. *Id.* at 1163.

85. *Lauter*, 933 N.E.2d at 1263.

Appendix A: Lawyer Advertising Rules (as amended 2011)

Rule 7.1: Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Commentary

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. In the absence of special circumstances that serve to protect the probable targets of a communication from being misled or deceived, a communication will violate Rule 7.1 if it:

- (1) is intended or is likely to result in a legal action or a legal position being asserted merely to harass or maliciously injure another;
- (2) contains statistical data or other information based on past performance or an express or implied prediction of future success;
- (3) contains a claim about a lawyer, made by a third party, that the lawyer could not personally make consistent with the requirements of this rule;
- (4) appeals primarily to a lay person's fear, greed, or desire for revenge;
- (5) compares the services provided by the lawyer or a law firm with other lawyers' services, unless the comparison can be factually substantiated;
- (6) contains any reference to results obtained that may reasonably create an expectation of similar results in future matters;
- (7) contains a dramatization or re-creation of events unless the advertising clearly and conspicuously discloses that a dramatization or re-creation is being presented;
- (8) contains a representation, testimonial, or endorsement of a lawyer or other statement that, in light of all the circumstances, is intended or is likely to create an unjustified expectation about a lawyer or law firm or a person's legal rights;
- (9) states or implies that a lawyer is a certified or recognized specialist other than as permitted by Rule 7.4;
- (10) is prohibited by Rule 7.3.

[3] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Rule 7.2: Advertising

(a) Subject to the requirements of this rule, lawyers and law firms may advertise their professional services and law related services. The term “advertise” as used in these Indiana Rules of Professional Conduct refers to any manner of public communication partly or entirely intended or expected to promote the purchase or use of the professional services of a lawyer, law firm, or any employee of either involving the practice of law or law-related services.

(b) A lawyer shall not give anything of value to a person for recommending or advertising the lawyer’s services except that a lawyer may:

- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
- (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service described in Rule 7.3(d);
- (3) pay for a law practice in accordance with Rule 1.17; and
- (4) refer clients to another lawyer or a non-lawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
 - (i) the reciprocal referral agreement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the agreement.

(c) Any communication subject to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content. The lawyer or law firm responsible for the content of any communication subject to this rule shall keep a copy or recording of each such communication for six years after its dissemination.

Commentary

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising.

[2] Provided that the advertising otherwise complies with the requirements of the Rules of Professional Conduct, permissible subjects of advertising include:

- (1) name and contact information, including the name and contact information for an attorney, a law firm, and professional associates;
- (2) one or more fields of law in which the lawyer or law firm practices, using commonly accepted and understood definitions and designations;
- (3) date and place of birth;
- (4) date and place of admission to the bar of state and federal courts;
- (5) schools attended, with dates of graduation, degrees, and other scholastic distinctions;
- (6) academic, public or quasi-public, military, or professional

positions held;

(7) military service;

(8) legal authorship;

(9) legal teaching position;

(10) memberships, offices, and committee assignments, in bar professional, scientific, or technical associations or societies;

(11) memberships and offices in legal fraternities and legal societies;

(12) technical and professional licenses;

(13) memberships in scientific, technical, and professional associations and societies;

(14) foreign language ability;

(15) names and addresses of bank references;

(16) professional liability insurance coverage;

(17) prepaid or group legal services programs in which the lawyer participates as allowed by Rule 7.3(d);

(18) whether credit cards or other credit arrangements are accepted;

(19) office and telephone answering service hours; and

(20) fees charged and other terms of service pursuant to which an attorney is willing to provide legal or law-related services.

[3] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

[4] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of non-lawyers who prepare marketing materials for them.

Rule 7.3: Direct Contact with Prospective Clients

(a) A lawyer (including the lawyer's employee or agent) shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by in-person or by written, recorded, audio, video, or electronic communication, including the Internet, if:

(1) the prospective client has made known to the lawyer a desire not to

be solicited by the lawyer;

(2) the solicitation involves coercion, duress or harassment;

(3) the solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the solicitation is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the initiation of the solicitation;

(4) the solicitation concerns a specific matter and the lawyer knows, or reasonably should know, that the person to whom the solicitation is directed is represented by a lawyer in the matter; or

(5) the lawyer knows, or reasonably should know, that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

(c) Every written, recorded, or electronic communication from a lawyer soliciting professional employment from a prospective client potentially in need of legal services in a particular matter shall include the words “Advertising Material” conspicuously placed both on the face of any outside envelope and at the beginning of any written communication, and both at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2). A copy of each such communication shall be filed with the Indiana Supreme Court Disciplinary Commission at or prior to its dissemination to the prospective client. A filing fee in the amount of fifty dollars (\$50.00) payable to the “Supreme Court Disciplinary Commission Fund” shall accompany each such filing. In the event a written, recorded, or electronic communication is distributed to multiple prospective clients, a single copy of the mailing less information specific to the intended recipients, such as name, address (including email address) and date of mailing, may be filed with the Commission. Each time any such communication is changed or altered, a copy of the new or modified communication shall be filed with the Disciplinary Commission at or prior to the time of its mailing or distribution. The lawyer shall retain a list containing the names and addresses, including email addresses, of all persons or entities to whom each communication has been mailed or distributed for a period of not less than one (1) year following the last date of mailing or distribution. Communications filed pursuant to this subdivision shall be open to public inspection.

(d) A lawyer shall not accept referrals from, make referrals to, or solicit clients on behalf of any lawyer referral service unless such service falls within clauses (1)-(4) below. A lawyer or any other lawyer affiliated with the lawyer or the lawyer’s law firm may be recommended, employed, or paid by, or cooperate with, one of the following offices or organizations that promote the use of the lawyer’s services or those of the lawyer’s firm, if there is no interference with the exercise of independent professional judgment on behalf of a client of the lawyer or the lawyer’s firm:

(1) A legal office or public defender office:

(A) operated or sponsored on a not-for-profit basis by a law school accredited by the American Bar Association Section on Legal Education and Admissions to the Bar;

- (B) operated or sponsored on a not-for-profit basis by a bona fide non-profit community organization;
 - (C) operated or sponsored on a not-for-profit basis by a governmental agency;
 - (D) operated, sponsored, or approved in writing by the Indiana State Bar Association, the Indiana Trial Lawyers Association, the Defense Trial Counsel of Indiana, any bona fide county or city bar association within the State of Indiana, or any other bar association whose lawyer referral service has been sanctioned for operation in Indiana by the Indiana Disciplinary Commission; and
 - (E) operated by a Circuit or Superior Court within the State of Indiana.
- (2) A military legal assistance office;
 - (3) A lawyer referral service operated, sponsored, or approved by any organization listed in clause (1)(D); or
 - (4) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only if the following conditions are met:
 - (A) the primary purposes of such organization do not include the rendition of legal services;
 - (B) the recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization;
 - (C) such organization does not derive a financial benefit from the rendition of legal services by the lawyer; and
 - (D) the member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in the matter.
- (e) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client, except that the lawyer may pay for public communication permitted by Rule 7.2 and the usual and reasonable fees or dues charged by a lawyer referral service falling within the provisions of paragraph (d) above.
- (f) A lawyer shall not accept employment when the lawyer knows, or reasonably should know, that the person who seeks the lawyer's services does so as a result of lawyer conduct prohibited under this Rule 7.3.

Commentary

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it

difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services.

[3] The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone, or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2, the lawyer receives

no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This rule allows targeted solicitation of potential plaintiffs or claimants in personal injury and wrongful death causes of action or other causes of action that relate to an accident, disaster, death, or injury, but only if such solicitation is initiated no less than 30 days after the incident. This restriction is reasonably required by the sensitized state of the potential clients, who may be either injured or grieving over the loss of a family member, and the abuses that experience has shown exist in this type of solicitation.

Rule 7.4: Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that the lawyer is a specialist in a particular field of law, unless:

(1) The lawyer has been certified as a specialist by an Independent Certifying Organization accredited by the Indiana Commission for Continuing Legal Education pursuant to Admission and Discipline Rule 30; and,

(2) The certifying organization is identified in the communication.

(e) Pursuant to rule-making powers inherent in its ability and authority to police and regulate the practice of law by attorneys admitted to practice law in the State of Indiana, the Indiana Supreme Court hereby vests exclusive authority for accreditation of Independent Certifying Organizations that certify specialists in legal practice areas and fields in the Indiana Commission for Continuing Legal Education. The Commission shall be the exclusive accrediting body in Indiana, for purposes of Rule 7.4(d)(1), above; and shall promulgate rules and guidelines for accrediting Independent Certifying Organizations that certify specialists in legal practice areas and fields. The rules and guidelines shall include requirements of practice experience, continuing legal education, objective examination; and, peer review and evaluation, with the purpose of providing assurance to the consumers of legal services that the attorneys attaining certification within areas of specialization have demonstrated extraordinary proficiency within those areas of specialization. The Supreme Court shall retain review oversight with respect to the Commission, its requirements, and its rules and guidelines. The Supreme Court retains the power to alter or amend such requirements, rules and guidelines; and, to review the actions of the Commission in respect to this Rule 7.4.

Commentary

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

Rule 7.5: Firm Names and Letterheads

(a) Firm names, letterheads, and other professional designations are subject to the following requirements:

(1) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1.

(2) The name of a professional corporation, professional association, limited liability partnership, or limited liability company may contain, "P.C.," "P.A.," "LLP," or "LLC" or similar symbols indicating the nature of the organization.

(3) If otherwise lawful a firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. See Admission & Discipline Rule 27.

(4) A trade name may be used by a lawyer in private practice subject to the following requirements:

(i) the name shall not imply a connection with a government agency or with a public or charitable legal services organization and shall not otherwise violate Rule 7.1.

(ii) the name shall include the name of a lawyer (or the name of a deceased or retired member of the firm, or of a predecessor firm in a manner that complies with subparagraph (2) above).

(iii) the name shall not include words other than words that comply with clause (ii) above and words that:

(A) identify the field of law in which the firm concentrates its work,
or

(B) describe the geographic location of its offices, or

(C) indicate a language fluency.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in Indiana if the name or other designation does not violate paragraph (a) and the identification of the lawyers in an office of the firm indicates the jurisdictional limitations on those not licensed to practice in Indiana.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm. A

member of a part-time legislative body such as the General Assembly, a county or city council, or a school board is not subject to this rule.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when they in fact do so.

Commentary

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity, or by a trade name that complies with the requirements of the Rules of Professional Conduct. A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. The use of a trade name in law practice is acceptable so long as it is not misleading and otherwise complies with the requirements of paragraph (a)(4). A firm name that includes the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a non-lawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

RECENT DEVELOPMENTS IN REAL PROPERTY LAW: OCTOBER 1, 2009 – SEPTEMBER 30, 2010

MARCI A. REDDICK*

I. CONVEYANCES AND PURCHASE AGREEMENTS

Once again, several cases concerning tax deeds were published by the Indiana Court of Appeals during this reporting term. In the most interesting case, *Tajuddin v. Sandhu Petroleum Corp. No. 3*,¹ errors by the Office of the Lake County Assessor required a “do-over” by a purchaser of a parcel in a tax sale.

Sandhu Petroleum Corporation No. 3 (“Sandhu”) owned three parcels of real estate, each with its own key number (“Key 12,” “Key 14,” and “Key 17”).² A gas station and other improvements were located on Key 17, while Keys 12 and 14 were vacant land.³ Due to staff errors by the Office of the Lake County Assessor, the improvements on the parcel identified as Key 17 were assessed on the parcel identified as Key 12.⁴ The owners of Sandhu received and paid property tax bills for Keys 12 and 14; however, they did not realize that the property consisted of three separate key numbers, and they did not provide the assessor with an updated address for Key 17.⁵ The owners also did not realize that they were supposed to be receiving property tax bills for Key 17 because the amount of taxes they were paying for Keys 12 and 14 were consistent with the total amount of property taxes they had paid on all three parcels when they purchased the land.⁶

Because tax bills were not sent to the owners of Sandhu for Key 17, the parcel was eligible for tax sale and was sold to Tajuddin at such a sale on October 30, 2006.⁷ Tajuddin sent notice of the sale via certified mail on April 30, 2007 to “Sandu [sic] Petroleum Corporation Number 3” at the address of record, but the notice was returned marked “Attempted—Not Known.”⁸ Tajuddin then hired a process server to post the notice on the door of the gas station and mail a notice to Sandhu by first class mail.⁹ Finally, Tajuddin published notice of the tax sale in the local paper as required by statute.¹⁰ He

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1. 921 N.E.2d 891 (Ind. Ct. App. 2010).

2. *Id.* at 892.

3. *Id.*

4. *See id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

petitioned for a tax deed, but Sandhu objected.¹¹ The trial court concluded that Tajuddin had not provided the required notice of the tax sale to Sandhu; however, the court of appeals found that this decision was not supported by the record.¹²

On appeal, the court upheld the trial court's ruling that Sandhu's payment of property taxes that were assessed on Key 12, but which were for the improvements on Key 17, prohibited issuing the tax deed.¹³ The court of appeals reversed the trial court's ruling that Tajuddin had not provided proper notice to Sandhu, finding that the notice was incorrect due to errors of the assessor's office and that both parties had a right to rely on the information in the assessor's office.¹⁴ It concluded that equitable principles required denying the tax deed and following the notice procedure required by statute—with the correct address for the owner of Key 17.¹⁵

*Christy v. Sebo*¹⁶ concerned a breach of warranty of title and the interpretation of an attorneys' fees clause in a purchase agreement. In this case, Paul and Julia Christy purchased property from Paul and Anita Sebo.¹⁷ After the closing, the Christys' neighbors (the Clarks) filed suit alleging that they owned a quarter-acre section of the Christys' real estate through adverse possession.¹⁸ The Christys counterclaimed, filing a third party complaint against the Sebos alleging breach of warranty of title and a cross-claim against the Clarks for trespass.¹⁹ After a series of summary judgment proceedings, the Clarks and the Christys ultimately entered into an agreement settling the Clarks' claims against the Christys.²⁰ The trial court granted the Christys' motion for partial summary judgment against the Sebos, holding that the Sebos had breached the warranty of title in the purchase agreement.²¹

Following this ruling, the Christys filed another motion for summary judgment against the Sebos to recover damages for the breach of warranty of title.²² The trial court awarded damages to the Christys for the costs they incurred defending the adverse possession claim, as well as attorneys' fees they incurred in prosecuting their breach of warranty claim against the Sebos;²³ however, the court refused to award the Christys the costs for the survey that was

11. *Id.*

12. *Id.* at 893-94.

13. *Id.* at 895.

14. *Id.*

15. *Id.* at 894-95.

16. 930 N.E.2d 1154 (Ind. Ct. App. 2010).

17. *Id.* at 1156.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 1156-57.

done in conjunction with defending the Clarks' claim.²⁴ Subsequently, the Sebos filed a motion for recusal and a motion to reconsider errors arguing that the Christys should not have been awarded attorneys' fees defending the Clarks' adverse possession claim or their breach of warranty claim against the Sebos.²⁵ The case was transferred to the Morgan Superior Court, and that court set aside the original award of attorneys' fees and costs.²⁶ At the subsequent damages hearing, the court gave the Christys summary judgment but held that they should not receive attorneys' fees under the purchase agreement.²⁷

On appeal, the court observed that the settlement of the dispute between the Christys and the Clarks concerning the Clarks' adverse possession claim had nothing to do with the question of whether the Sebos breached the warranty of title to the Christys.²⁸ The court held that the Christys were entitled to reasonable attorneys' fees and costs, including survey costs, in defending their property against the Clarks' adverse possession claim.²⁹ Next, the court turned to the attorneys' fees clause in the Christys' purchase agreement, which stated as follows: "Any party to this Agreement who is the prevailing party in any legal or equitable proceeding against any other party brought under or with relation to the Agreement or transaction shall be additionally entitled to recover court costs and reasonable . . . [attorneys'] fees from the non-prevailing party."³⁰ The court discussed the well-settled Indiana rule recognizing the ability of parties "to enter into fee-shifting provisions as long as the . . . [provisions do] not violate public policy," noting that allowing attorneys' fees pursuant to an agreement is designed to compensate a party who has successfully enforced his or her legal rights in court.³¹ The court held that the trial court correctly found that the Sebos breached the warranty of title.³² As a result, the court concluded that the Christys, as the prevailing party in the litigation, were entitled to their attorneys' fees and expenses incurred in litigating the breach of warranty claim against the Sebos based on the attorneys' fees provision in the purchase agreement.³³

II. COVENANTS

Several cases in recent years have addressed the scope of ingress and egress easements. In *McCauley v. Harris*,³⁴ the court was asked to determine whether or not the Harrises—holders of a thirty-foot-wide ingress and egress easement

24. *Id.* at 1157.

25. *Id.*

26. *Id.*

27. *Id.* at 1158.

28. *Id.* at 1159.

29. *Id.*

30. *Id.* at 1156.

31. *Id.* at 1160.

32. *Id.*

33. *Id.*

34. 928 N.E.2d 309 (Ind. Ct. App. 2010), *reh'g and trans. denied*.

over the property of the McCauleys—had the right to clear and pave the entirety of the easement, which required removing a portion of the McCauleys' pole barn.³⁵ The court concluded that the ingress/egress easement was not limited to merely permitting access over the servient estate by the Harrises.³⁶ Relying on *Drees Co. v. Thompson*,³⁷ the court affirmed the trial court's decision, holding that the plain and ordinary meaning of the language used in the easement and the parties' intent established a clearly defined thirty-foot easement for the purpose of ingress, egress, and utilities.³⁸ The court concluded that the terms of the easement had to be enforced as written, thereby preventing the trial court from expanding the easement or restricting its terms.³⁹ The court upheld the trial court's ruling that the Harrises' use and enjoyment of the easement necessarily included "the right to use the easement in its entirety and to construct a roadway over all or any part of the easement."⁴⁰ This was the foundation for the court's ruling that the McCauleys' pole barn encroached on the easement and was a material impairment of the easement requiring its removal.⁴¹

*Bass v. Salyer*⁴² concerned Jeffrey and Renea Salyer's claim of a prescriptive easement over property owned by Jerry and Bettye Bass abutting Yellow Creek Lake in Kosciusko County.⁴³ The Salyers filed a quiet title action alleging that they had (1) a prescriptive easement over real estate that had been platted as a driveway between County Road 850 and Yellow Creek Lake and (2) the right to access the riparian area of Yellow Creek Lake.⁴⁴ The Salyers also sought to enjoin the Basses and adjacent property owners (the Suttons) from interfering with the Salyers' use of the prescriptive easement.⁴⁵ The Basses argued that the existing driveway was dedicated to the public use according to previous plats and, as a result, the Salyers could not obtain a prescriptive easement to use the drive.⁴⁶ The trial court ruled in favor of the Salyers' quiet title action establishing the prescriptive easement and access to the riparian area along the lake, and the Basses appealed.⁴⁷

The court of appeals observed that prescriptive easements are not favored in the law and that a person claiming a prescriptive easement must therefore meet

35. *Id.* at 311.

36. *Id.* at 314.

37. 868 N.E.2d 32 (Ind. Ct. App. 2007).

38. *McCauley*, 928 N.E.2d at 315.

39. *Id.*

40. *Id.*

41. *Id.* at 316.

42. 923 N.E.2d 961 (Ind. Ct. App. 2010).

43. *Id.* at 962-63.

44. *Id.* at 964.

45. *Id.*

46. *See id.* at 963-64.

47. *Id.* at 963.

strict requirements.⁴⁸ It recited the rules from *Wilfong v. Cessna Corp.*,⁴⁹ where the Indiana Supreme Court modified longstanding traditional elements of the requirements to establish a prescriptive easement to follow the court's reformulation of the elements of adverse possession.⁵⁰ In *Wilfong*, the Indiana Supreme Court held that the claimant in an adverse possession case (and, by extension, a prescriptive easement case) must establish "clear and convincing proof of (1) control, (2) intent, (3) notice, and (4) duration."⁵¹ The court continued, "This reformulation [of the adverse possession rule] applies as well for establishing prescriptive easements, save for those differences required by the differences between fee interests and easements."⁵² The court followed the long-established Indiana rule regarding easements that the intent of those creating the driveway was controlling.⁵³ Ultimately, the court found that the Salyers' use of the public easement was permissive and that the Salyers, like other members of the public, were able to use a platted drive for access to the lake.⁵⁴ The court added that the Salyers' use of the drive was "consistent with the grant of the public easement and did not become an adverse use until their right to use the easement expired when the [d]rive was vacated."⁵⁵ Additionally, the court noted that when the Salyers used the private drive, it was a dedicated public way.⁵⁶ The court pointed out that the Salyers used the drive as a public easement for its intended purpose (to access the lake), preventing them from claiming they used the easement under a claim of right that was exclusive, hostile, or adverse to the Basses' interest in the property as the owners of the fee.⁵⁷ The court stated that the Salyers' claim of a prescriptive easement was based solely upon the general public's right to use the dedicated drive.⁵⁸ As a result, their right of access to the lake depended upon rights granted to others in the plat, and it could not be said that their use of the drive or any right of access was exclusive concerning the right of the public at large.⁵⁹ The court summarized the holding concerning the prescriptive easement as follows:

In sum, the Salyers' use of the [d]rive to access the lake was permissive, that is, their use of the [d]rive was a permitted use under the public easement. A permissive use cannot be adverse so as to ripen into an easement by prescription. A right shared with the public is, by

48. *Id.* at 964.

49. 838 N.E.2d 403 (Ind. 2005).

50. *Bass*, 923 N.E.2d at 965.

51. *Wilfong*, 838 N.E.2d at 406 (quoting *Fraley v. Minger*, 829 N.E.2d 476, 486 (Ind. 2005)).

52. *Id.* at 406.

53. *See Bass*, 923 N.E.2d at 966.

54. *Id.* at 967.

55. *Id.*

56. *Id.* at 968.

57. *See id.* at 967-68.

58. *Id.* at 968.

59. *Id.* at 969.

definition, non-exclusive. And where, as here, the use was not adverse, the easement cannot be expanded by prescription into an exclusive easement.⁶⁰

The next issue considered was whether the Salyers had established a prescriptive easement in the riparian area where the driveway met the lake. The court noted that one claiming riparian rights and an interest in the riparian area of a lake must first have “a property interest in the land appurtenant to the water.”⁶¹ Continuing on, the court noted that “[a]lthough riparian rights arise from ownership of the land appurtenant to the water, we have also held that one may acquire a prescriptive easement in riparian rights.”⁶² The court held that because the Salyers neither established a prescriptive easement in the drive nor owned a fee simple interest or a prescriptive easement abutting the lake, they could not have a prescriptive easement over the Basses’ riparian rights.⁶³

III. LAND USE

A. Annexation

The border war between the City of Greenwood, a developer, a landowner, and the Town of Bargersville was the topic of much debate during this reporting period and provides a good primer on how Indiana’s annexation statutes are utilized.⁶⁴ At issue in this case was Bargersville’s attempt to annex property located adjacent to the City of Greenwood.⁶⁵ The trial court upheld Bargersville’s annexation of an area located within three miles of Greenwood’s city limits.⁶⁶ The two issues raised on appeal were as follows: (1) whether Greenwood had standing to seek a declaratory judgment regarding the validity of Bargersville’s annexation based on whether 51% of the annexed area’s landowners had consented; and (2) if so, whether it was error for the trial court to conclude that 51% of the landowners consented to Bargersville’s annexation.⁶⁷

The Indiana Court of Appeals reviewed the three methods for annexing property under Indiana’s statutory scheme. The first method, the court observed, may be used by a municipality to annex contiguous or non-contiguous territory meeting certain statutory requirements.⁶⁸ The second form of annexation may be initiated by property owners desiring to be annexed into a contiguous municipality. To support this type of annexation, a petition signed by at least

60. *Id.* at 970 (internal citations omitted).

61. *Id.* at 971.

62. *Id.*

63. *Id.* at 973.

64. *City of Greenwood v. Town of Bargersville*, 930 N.E.2d 58 (Ind. Ct. App.), *trans. granted*, 940 N.E.2d 831 (Ind. 2010), *opinion reinstated*, 942 N.E.2d 110 (Ind. 2011).

65. *Id.* at 62.

66. *Id.* at 60.

67. *Id.*

68. *Id.*; IND. CODE § 36-4-3-4 (2011).

51% of the property owners in the territory sought to be annexed or property owners holding 75% of the total assessed value of the territory must be submitted to the municipality's legislative body.⁶⁹ The third form of annexation, which was the subject of this case, involves towns wishing to annex property located near a city.⁷⁰ This type of annexation requires "the consent of the legislative body of a second or third class city before annexing territory within three (3) miles of the corporate boundaries of that city" unless at least 51% of the property owners in the territory the town proposes to annex consent to the annexation.⁷¹

In the case at hand, Bargersville and Greenwood sought to annex the same property located in Johnson County.⁷² However, instead of beginning annexation proceedings, Greenwood entered into a sewer service agreement for locations within the annexation area.⁷³ Greenwood began constructing a lift station and started providing service to one of the areas in the Bargersville annexation area, and Greenwood entered into an additional sewer service agreement for a later development.⁷⁴ Greenwood then built infrastructure exceeding the needs of current and future developments in the area.⁷⁵

On the opposing side, Bargersville engaged a contractor to improve its sewer infrastructure in a project that included construction of sewer lift stations, interceptor lines, and other sewer work to serve property owners in the proposed annexation area.⁷⁶ Bargersville introduced an ordinance on November 13, 2007 to begin the process of annexing 3360 acres. A public hearing was held on October 15, 2008 regarding Bargersville's ordinance, which had been amended to add 1847 acres.⁷⁷ Bargersville's town council determined that Greenwood did not consent to the annexation and that as a result, Bargersville had to obtain consent from 51% of the owners of the 739 parcels in the proposed annexation area.⁷⁸ Bargersville relied upon annexation waivers as evidence of the property owners' consent to the annexation and maintained that it had satisfied the statutory consent requirement.⁷⁹ The town argued that the property owners expressly consented to the annexation because they signed a sewer service agreement for one of the projects or agreed to an annexation waiver (which did not contain the word "consent").⁸⁰ Greenwood charged that Bargersville's "consent" was insufficient and asked the trial court to declare Bargersville's annexation ordinance invalid and enjoin Bargersville from taking any further

69. *City of Greenwood*, 930 N.E.2d at 61; IND. CODE § 36-4-3-5.

70. *City of Greenwood*, 930 N.E.2d at 61; IND. CODE § 36-4-3-9.

71. IND. CODE § 36-4-3-9(b).

72. *City of Greenwood*, 930 N.E.2d at 62.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 63.

79. *Id.*

80. *Id.*

action to implement the annexation ordinance.⁸¹

The trial court found that Greenwood did not have standing to remonstrate against Bargersville's annexation because it did not own land in the proposed annexation territory; however, it held that Greenwood did have standing to bring a declaratory judgment action because Bargersville's proposed annexation would affect Greenwood's rights under contracts among Greenwood, the other plaintiffs, and other property owners in the proposed annexation area.⁸² In addition, the trial court held that Bargersville's signed annexation waivers were sufficient to evidence consent by property owners to the proposed annexation under the statute.⁸³ Finally, the trial court enjoined Greenwood from providing sewer service to the proposed annexation area.⁸⁴

Concerning the first issue on appeal (whether Greenwood had standing to challenge Bargersville's annexation), the court of appeals rejected Bargersville's arguments that Greenwood had no interest in its three-mile buffer zone and could not challenge an annexation based on the interests of landowners according to the applicable annexation statute, Indiana Code section 36-4-3-9.⁸⁵ The court noted that Greenwood was not asking that its sewer service agreements be enforced; rather, it sought a judicial interpretation of the agreement as permitted by the Indiana Declaratory Judgment Act.⁸⁶ The court held that Greenwood had a significant interest in its three-mile buffer zone and that such interest would be affected by the sewer service agreements on which Bargersville relied in concluding that it had consent from 51% of the property owners in the proposed annexation area.⁸⁷ As a result, the court held that Greenwood was entitled to seek a declaratory judgment regarding whether the agreements were legally valid "consents" to the annexation.⁸⁸ In addition, Greenwood was entitled to seek a declaratory judgment regarding the validity of Bargersville's annexation ordinance.⁸⁹

As for the second question on appeal (whether 51% of the annexation area's property owners consented to Bargersville's annexation), the court noted that whether a waiver of the right to remonstrate, object to, or appeal an annexation constitutes "consent" as contemplated by Indiana Code section 36-4-3-9 had not been addressed by an Indiana appellate court.⁹⁰ Following the judicial standard of interpreting contracts by their plain meaning, the court concluded that the sewer service agreements affecting at least 407 of the parcels in the proposed

81. *Id.*

82. *Id.* at 64.

83. *Id.*

84. *See id.*

85. *Id.* at 66.

86. *Id.* at 67. The Indiana Declaratory Judgment Act is codified at IND. CODE § 34-14-1-2 (2011).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 68.

annexation territory (55% of the total number of parcels) did not constitute valid consent to Bargersville's annexation according to the applicable Indiana annexation statute.⁹¹

Another annexation case decided in this term, *Town of Dyer v. Town of St. John*,⁹² concerned the Town of Dyer's attempt to annex three parcels of property that were adjacent to Dyer's boundaries but not contiguous to each other.⁹³ The court discussed the history of annexation and the public policy behind how the statutes developed—in particular, the requirement that property to be annexed must be contiguous.⁹⁴ The court stated the ultimate conclusion in this case best:

Since 1864, there has been an understanding that all of the tracts of land the municipality seeks to annex must be contiguous to each other. . . . If the legislature had wanted to allow the annexation of multiple, non-adjacent parcels of land in a single annexation ordinance, which would appear to contravene over a century of case law, it could have expressly drafted the new definition of contiguity in 1981 to clearly say so.⁹⁵

The last annexation case to be discussed in this year's survey's article is *In re Annexation of Certain Territory to the City of Muncie v. Certain Halteman Village Section I*,⁹⁶ where the fiscal plan of the City of Muncie and the financial impact of the proposed annexation on city services were at issue. The city adopted a fiscal plan based on the annexation of two subdivisions into the city and subsequently adopted two ordinances annexing the subdivisions.⁹⁷ Property owners in the two subdivisions remonstrated against the annexation.⁹⁸ The trial court found many flaws in the annexation, including that the Muncie ordinances and the fiscal plan did not meet the requirements of Indiana Code section 36-4-3-13(d) for the following reasons: they did not take property tax caps into consideration; cost estimates for the cost of city services for the annexed property were not provided; and the fiscal plan did not provide fire protection services to the annexed property equivalent to those currently provided within the city within a year of the annexation.⁹⁹

Reversing the trial court, the court of appeals found that subsection 13(d) of the annexation statute only requires cost estimates in a fiscal plan, which the city

91. *Id.* at 70-71. On January 29, 2011, a split decision by the Indiana Supreme Court on this case resulted in the appellate court's decision being reinstated. *City of Greenwood v. Town of Bargersville*, 942 N.E.2d 110 (Ind. 2011). According to Indiana Appellate Rule 58, the intermediate appellate court's decision rendered on July 15, 2010 must be reinstated. *See id.* at 110.

92. 919 N.E.2d 1196 (Ind. Ct. App. 2010).

93. *Id.* at 1197.

94. *Id.* at 1200-01.

95. *Id.* at 1201-02.

96. 914 N.E.2d 796 (Ind. Ct. App. 2009), *trans. denied*.

97. *Id.* at 799.

98. *Id.*

99. *See id.* at 799-801.

had provided.¹⁰⁰ Furthermore, city officials had testified at trial that there would be no extra cost to the city as a result of the annexation for non-capital city services.¹⁰¹ The court also rejected the trial court's holding that the annexation would have a "significant financial impact" on the residents of the annexed property because there was no evidence that the annexation would result in a tax increase—there was only the potential for a tax increase.¹⁰²

B. Inverse Condemnation

Three significant cases discussing inverse condemnation were decided during the reporting period for this article. In the first case, *Murray v. City of Lawrenceburg*,¹⁰³ the Indiana Supreme Court addressed property owners' claims against the City of Lawrenceburg alleging that they owned a portion of the land under the local casino. The plaintiffs claimed to own a small parcel (less than an acre) located within a thirty-two-acre parcel in the City of Lawrenceburg along the Ohio River, which serves as the docking site for the Argosy Casino (operated by Indiana Gaming Co., L.P.—"Indiana Gaming").¹⁰⁴ The plaintiffs alleged that they were the successors in interest to the tenants in common (who were the grantees of the disputed parcel in an 1886 deed) and that from 1941 to 1945, the property had been incorrectly labeled on the Lawrenceburg flood control land acquisition map as having an "unknown" owner.¹⁰⁵ No one else claimed to have owned the property during that period of time.¹⁰⁶ In December 1995, the Lawrenceburg Conservancy District leased the thirty-two-acre site to the city and warranted title to the thirty-two acres, except for the parcel that was the subject of this case.¹⁰⁷ In 1996, the Central Railroad Company of Indiana gave the city a quitclaim deed for the disputed parcel with an affidavit "stating that it obtained title to the parcel through an 1865 deed from the White Water Valley Canal Company."¹⁰⁸ The city then subleased the thirty-two-acre parcel to Indiana Gaming in August 1996, and the casino began operations in December 1997.¹⁰⁹

The plaintiffs filed suit in November 2005 against the city, the conservancy district and Indiana Gaming seeking to quiet title to the disputed parcel, remove the defendants from the property, set aside the quitclaim deed and leases, and recover damages for not receiving the rent from the leases.¹¹⁰ The defendants moved for judgment on the pleadings, alleging that the plaintiffs' only cause of

100. *Id.* at 803.

101. *Id.* at 804.

102. *Id.* at 805-06.

103. 925 N.E.2d 728 (Ind. 2010).

104. *Id.* at 729.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 729-30.

109. *Id.* at 730.

110. *Id.*

action was a case for inverse condemnation, which was barred by the six-year statute of limitations for injury to real property.¹¹¹ The trial court denied the motion, and an interlocutory appeal followed.¹¹² Although the court of appeals rejected the interlocutory appeal, it accepted a second interlocutory appeal by the plaintiffs from the trial court's subsequent denial of their demand for a jury trial because ownership of the disputed parcel had not been established.¹¹³ The defendants again cross-appealed, requesting appellate review of the trial court's denial of their motion for judgment on the pleadings based on their argument that the statute of limitations barred the plaintiffs' claims.¹¹⁴

When the case was transferred to the Indiana Supreme Court, the right of a jury trial was the only issue presented by the order of the trial court.¹¹⁵ The court determined that it had the obligation to review the trial court's ruling on a Rule 12(C) motion for judgment on the pleadings in addition to the claim for a jury trial.¹¹⁶ The court observed that the defendants' claim to judgment on the pleadings produced two issues for consideration: "whether inverse condemnation . . . [was] the only remedy available to [the] plaintiffs, and, if so, what statute of limitations applies to a claim for inverse condemnation."¹¹⁷

The court discussed the fundamentals of the law of inverse condemnation, citing the state's inherent authority to take private property for public use.¹¹⁸ In addition, the court observed that the Indiana Constitution and the Fifth Amendment to the U.S. Constitution require just compensation to property owners when private property is taken for public use.¹¹⁹ Next, the court noted that Indiana Code section 32-24-1 establishes the process by which the state may initiate eminent domain proceedings—and if the government takes property but does not initiate such proceedings, Indiana Code section 32-24-1-16 specifically provides that an owner of property acquired for public use may bring a claim for inverse condemnation to recover money damages.¹²⁰ The court next recited the basic elements of an action for inverse condemnation: "(1) a taking or damaging; (2) of private property; (3) for public use; (4) without just compensation being paid; and (5) by a governmental entity that has not instituted formal proceedings."¹²¹ Although the plaintiffs maintained that a quiet title action was appropriate because the title was clouded, the court disagreed, explaining that ownership of an interest in property is an element of a claim for inverse

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 731.

117. *Id.*

118. *Id.* at 731; *see also* *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

119. *Murray*, 925 N.E.2d at 731 (citing *Schnull v. Indianapolis Union Ry. Co.*, 131 N.E. 51, 52 (Ind. 1921)).

120. *Id.*

121. *Id.* (quoting 29A C.J.S. *Eminent Domain* § 560 (2007)).

condemnation—and if the plaintiffs did not own the parcel, they had no claim.¹²² On the contrary, if the plaintiffs owned the disputed parcel, their only remedy was a claim for inverse condemnation.¹²³ The court observed that declaratory and injunctive relief is not available to property owners where a lawful taking of private property for public use is alleged.¹²⁴ Rather, a suit for compensation may be brought against the government after the taking.¹²⁵ It explained further, relying on *Indiana Department of Transportation v. Southern Bells, Inc.*,¹²⁶ that equitable remedies are generally “unavailable [in takings claims] as a matter of law where an action for compensation can be brought subsequent to the taking.”¹²⁷

The plaintiffs also claimed trespass, but the court rejected this claim, observing that the authorities relied on by the plaintiffs were cases between private parties and did not address allegations of takings by a public authority.¹²⁸ The court observed that the same statute of limitations would apply to a trespass claim as an inverse condemnation action seeking damages.¹²⁹ Because the court concluded that the taking was for a public use, the plaintiffs’ sole remedy was a claim for inverse condemnation to which a six-year statute of limitations period applied.¹³⁰ In this case, the claims were barred because the action was brought more than six years after the date when Indiana Gaming began operations on the site in December 1997. The plaintiffs did not file this suit until November 2005, almost eight years later. As a result, the claims were barred by section 34-11-2-7 of the Indiana Code.¹³¹

A second inverse condemnation case during this term, *Sagarin v. City of Bloomington*,¹³² concerned a landowner and his neighbor’s claim brought against the City of Bloomington based on the theory of taking without just compensation. Following fatal accidents on a road in the landowner’s neighborhood, the City of Bloomington installed a stoplight at the corner of High Street and Southdowns Drive in 1972.¹³³ Later that year, a city employee visited the property owners (Campbell and the Jablonskis) to discuss the installation of a pathway “along their shared lot line for children to use to walk to and from school.”¹³⁴ Campbell refused to agree to the installation of the pathway, and the city employee told her “that her permission was not necessary because the city had the right to install

122. *Id.*

123. *Id.*

124. *See id.* at 731-32.

125. *Id.* at 732.

126. 723 N.E.2d 432 (Ind. Ct. App. 1999).

127. *Murray*, 925 N.E.2d at 732 (quoting *Southern Bells*, 723 N.E.2d at 434).

128. *Id.*

129. *Id.* at 733.

130. *Id.*

131. *Id.* at 733-34.

132. 932 N.E.2d 739 (Ind. Ct. App. 2010), *trans. denied*.

133. *Id.* at 742.

134. *Id.*

the path.”¹³⁵ City employees made similar statements to the Jablonskis, and in late 1972, a small asphalt pathway was installed.¹³⁶ Neither property owner executed an easement or right-of-way document giving the city the authority to proceed with installing the pathway.¹³⁷

Sagarin purchased the property from Campbell in 1993 and noticed the asphalt pathway.¹³⁸ His realtor explained that the city had an easement; however, Sagarin’s title work only provided evidence of a utility easement affecting the property and did not include an easement or right-of-way for the pathway.¹³⁹ In 2007, the city engineer contacted Sagarin and told him that the city planned to widen the pathway to eight feet.¹⁴⁰ Sagarin went to city and county offices to obtain a copy of his deed and a copy of any easements that related to his or Mrs. Jablonski’s property.¹⁴¹ He did not find any documents concerning the existence of an easement for either property.¹⁴² On July 6, 2007, Sagarin and Jablonski filed a complaint against the city alleging ejectment, inverse condemnation, and taking without just compensation.¹⁴³ They also sought to quiet title and restore the pathway property to their respective property.¹⁴⁴ At a bench trial, judgment was entered in favor of Jablonski on the inverse condemnation and taking without just compensation claims, but against Sagarin on both claims.¹⁴⁵ The court ordered appraisers to value the easement and assess damages for Jablonski.¹⁴⁶

When Sagarin appealed the trial court’s ruling concerning his inverse condemnation claim, the court of appeals concluded that he could not claim inverse condemnation because Campbell, not Sagarin, owned the property at the time the property was taken.¹⁴⁷ The court of appeals agreed with the trial court that when Sagarin purchased the property, he saw the pathway and was therefore on notice of the possibility of a burden on the property resulting in potential economic injury. Further, he had the opportunity to address this matter during negotiations to acquire the property.¹⁴⁸

Jablonski also argued that she was entitled to the equitable remedy of ejectment because the property for the pathway was taken by the city by

135. *Id.* at 742-43.

136. *Id.* at 743.

137. *See id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* By this time, one of the Jablonskis was deceased.

142. *Id.*

143. *Id.*

144. *See id.*

145. *Id.*

146. *Id.*

147. *Id.* at 743-44.

148. *Id.* at 744.

fraudulent means. Citing *Murray v. City of Lawrenceburg*,¹⁴⁹ the court explained that her only remedy was a suit for inverse condemnation. It noted that whether her property was taken by fraud or inverse condemnation, the remedy was still the same, and the remedies provided by the Indiana Code were all that were available to her.¹⁵⁰ The court concluded that the city exercised its authority according to state law to take private property for public use; however, it did not comply with constitutional and statutory mandates of just compensation.¹⁵¹ As a result, Jablonski was entitled to receive damages under the state's eminent domain statute.¹⁵² The court added that she was also able to recover attorneys' fees consistent with the statute.¹⁵³

The appeal then addressed the question of the statute of limitations. The city argued that while the government must compensate landowners for a taking, the six-year statute of limitations for inverse condemnation had run in this case.¹⁵⁴ The court rejected the city's argument and instead ruled that the city had fraudulently concealed the fact that the property owners were entitled to compensation from the city for the pathway easement.¹⁵⁵ Specifically, the city engineer's statements that the city had obtained an easement to build the pathway, that it was a "done deal," and that the Jablonskis could not prevent the installation of the pathway—as well as the fact that the Jablonskis were not given any documents to sign to establish the easement or install the pathway—amounted to fraudulent concealment.¹⁵⁶ Noting that fraudulent concealment has been codified in section 34-11-5-1 of the Indiana Code, the court concluded that the city's statements prevented the homeowners from obtaining the information necessary to pursue a claim of inverse condemnation.¹⁵⁷

The city's last argument was that the easement was established by conscription or the common law theory of dedication.¹⁵⁸ The court found that the elements of a prescriptive easement were not met because the city had not used the land in a manner adverse to a property owner who, having knowledge of the adverse use, acquiesced.¹⁵⁹ In this case, there was no acquiescence by the Jablonskis due to the statements made by the city employee and because they had no knowledge of their right to terminate the public use of the pathway.¹⁶⁰ As for the other argument that the easement was acquired by the common law theory of

149. 925 N.E.2d 728, 723 (Ind. 2010).

150. *Sagarin*, 932 N.E.2d at 744.

151. *Id.*

152. *Id.* at 745.

153. *Id.*

154. *Id.* at 745-46.

155. *Id.* at 746.

156. *Id.* at 746-47.

157. *Id.*

158. *Id.* at 747.

159. *Id.*

160. *Id.*

dedication, the court observed that the two elements required for this type of easement were not met: “(1) the intent of the owner to dedicate and (2) the acceptance of the public of the dedication.”¹⁶¹ In a dissent, Judge Barnes stated that while he agreed with the majority opinion regarding Sagarin’s claims, he did not agree that the city prevented the Jablonskis from inquiring about the pathway easement “so as to toll the statute of limitations regarding their claim.”¹⁶² Judge Barnes noted that the pathway was constructed on an existing utility easement, and there was nothing in the record to suggest that the city concealed information from the Jablonskis that prevented them from obtaining the information that Sagarin discovered in 2007.¹⁶³ As a result, Judge Barnes could not agree with the majority that the city intended to fraudulently conceal the Jablonskis’ inverse condemnation claim.¹⁶⁴ He opined that the statute of limitations was designed to prevent this type of circumstance and “to guard against [these types of] stale claims, lost evidence, and faulty memories of witnesses.”¹⁶⁵

In *Sloan v. Town Council of Patoka*,¹⁶⁶ the plaintiff appealed the trial court’s decision in favor of the town and denied Sloan’s claims of inverse condemnation of a portion of his real estate.¹⁶⁷ The dispute between the town and Sloan dated to April 1982, when Sloan acquired property on South Barnes Street from his mother, who owned the property from 1941 to April 1982.¹⁶⁸ Barnes Street was a public right-of-way and was the only means of access to Sloan’s property.¹⁶⁹ Sloan and the town had disagreed about who should maintain Barnes Street for many years.¹⁷⁰ They reached a mediated settlement agreement in October 2006, and the town agreed to maintain Barnes Street and pave a portion of it by November 1, 2008.¹⁷¹ As part of the settlement, Sloan was required to sign all documents necessary to “legitimize the use of [Sloan’s] property that . . . [was] currently being utilized as the travel portion of South Barnes Street.”¹⁷² The town refused to perform its obligations pursuant to the settlement agreement, and Sloan had a survey prepared to determine the exact location of Barnes Street vis-à-vis his property.¹⁷³ According to the survey, Barnes Street ranged in width from twelve to fifteen feet and encroached eight feet on Sloan’s property.¹⁷⁴

161. *Id.* (citing *Jackson v. Bd. of Comm’rs of Cnty. of Monroe*, 916 N.E.2d 696, 704 (Ind. Ct. App. 2009), *trans. denied*)).

162. *Id.* at 748 (Barnes, J., dissenting).

163. *Id.*

164. *Id.*

165. *Id.*

166. 932 N.E.2d 1259 (Ind. Ct. App. 2010).

167. *Id.* at 1260.

168. *Id.* at 1261.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

Sloan and the prior owners of the property had not been compensated for the use of their property for the roadway.¹⁷⁵

Sloan filed a complaint for declaratory judgment and inverse condemnation against the town on March 9, 2007.¹⁷⁶ The town did not contest that this part of Barnes Street was located on Sloan's property; however, it argued that the street was maintained solely for providing access to Sloan's property.¹⁷⁷ After a bench trial, the court ruled that no taking or inverse condemnation had occurred.¹⁷⁸

The court of appeals recognized that Indiana Code section 32-24-1-16 is designed to provide compensation to property owners for a taking of property by a governmental authority that is otherwise prohibited by article I, section 21 of the Indiana Constitution.¹⁷⁹ The court noted that the record contained evidence that Barnes Street had existed as a graveled public thoroughfare since 1982 and was used by Sloan and other persons who owned homes on the street.¹⁸⁰ The record also demonstrated that neither Sloan nor the prior owners of the property had been compensated by the town for the use of the property for a public thoroughfare and that "no eminent domain proceedings had ever been initiated" for Barnes Street.¹⁸¹ The court stated that an eight-foot encroachment onto Sloan's property, over half of the Barnes Street right-of-way, was a substantial interference with Sloan's use and enjoyment of this part of his property that had been created by the town.¹⁸² In addition, the court stated that by graveling this part of Sloan's property "and allowing other property owners on the street to use this part of Barnes Street, the injury . . . [was] special and peculiar to his real estate and not some inconvenience suffered by the public generally."¹⁸³ As a result, the town's use of Sloan's property without compensation was a taking under the theory of inverse condemnation.¹⁸⁴ The trial court's holding was reversed, and the case was remanded to the trial court to appoint an appraiser and assess damages.¹⁸⁵

C. Zoning Cases

After several years with few reported decisions concerning cellular towers, there were two significant cases during this reporting period. In *Helcher v. Dearborn County*,¹⁸⁶ a wireless service provider and landowners appealed a

175. *Id.*

176. *Id.*

177. *Id.* at 1262.

178. *Id.* at 1261-62.

179. *Id.* at 1262.

180. *Id.*

181. *Id.* at 1263.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. 595 F.3d 710 (7th Cir. 2010).

decision by a township zoning board, alleging that the denial of their application for a conditional use permit to construct a cell phone tower violated the Telecommunications Act of the United States (the “Act”).¹⁸⁷ Cincinnati Bell Wireless, LLC (“Bell”) and several property owners petitioned to permit construction of a wireless cell phone tower on property owned by Dan and Merry Helcher in Dearborn County.¹⁸⁸ The Helchers’ property was in an agricultural district of Dearborn County, and Bell wanted to locate a cell tower there to close a signal gap.¹⁸⁹ According to the local zoning ordinance, one seeking to construct a cell phone tower must obtain a conditional use permit from the local zoning board (the “BZA”).¹⁹⁰ The ordinance specifically allowed non-agricultural uses in agricultural zoning districts, which includes cell phone towers under specific circumstances.¹⁹¹ Bell worked with the county’s consultants to meet conditional use criteria to establish the proposed cell tower.¹⁹² When the conditional use petition went before the BZA, the consultants presented their opinion that the petitioner had met the requirements necessary to construct the cell tower and that the permit should be granted.¹⁹³ Several neighboring property owners remonstrated against the petition.¹⁹⁴ Among those who spoke on behalf of the remonstrators was a real estate appraiser who testified about property values and expressed concerns regarding potential hazards to children if the cell tower was approved.¹⁹⁵ Bell had studied other potential sites for the cell tower, but they were not satisfactory.¹⁹⁶ Additional evidence was presented in support of the petition from the standpoint that the location was appropriate and necessary to provide service coverage to Bell’s customers.¹⁹⁷ The BZA rejected the petition.¹⁹⁸

On appeal to the Seventh Circuit, Bell argued that (1) the BZA’s decision did not comply with the requirements of the Act that a decision be “in writing;” (2) the BZA’s decision was not supported by substantial evidence; and (3) by denying the permit, Bell was prohibited from providing wireless communication services as a result of the zoning board’s unreasonable discrimination among wireless providers—all in violation of 47 U.S.C. § 332(c)(7).¹⁹⁹ The court first addressed the petitioner’s argument that the zoning board’s decision was not “in

187. *Id.* at 713-14.

188. *Id.* at 713.

189. *Id.* at 714.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 714-15.

194. *Id.* at 715.

195. *Id.*

196. *See id.*

197. *Id.*

198. *Id.*

199. *Id.* at 715-16.

writing” as required by the Act.²⁰⁰ The court stated that this was an issue of first impression in the Seventh Circuit and discussed a variety of approaches taken throughout the country concerning the issue.²⁰¹ It concluded that it would join the First, Sixth, and Ninth Circuits (the majority of the courts that had confronted this issue) in determining that the “in writing” requirements of the Act are satisfied if the written decision contains “a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons.”²⁰² The court concluded that the BZA’s minutes of the meeting when the decision was made were sufficient to determine, along with the written record, whether the decision was supported by substantial evidence.²⁰³

Next, the court addressed the argument that the decision by the BZA to deny their application for a conditional use permit was not supported by “substantial evidence.”²⁰⁴ The Act requires that any action by a state or local unit of government denying a request to install a wireless service facility must be in writing (as noted above) and supported by “substantial evidence contained in a written record.”²⁰⁵ The court followed established precedent that appellate review of the issue of whether “substantial evidence” supports a decision by a local unit of government will defer to the local unit of government and applied this standard to the substantial evidence requirements of the Act.²⁰⁶ Specifically, the court stated that substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²⁰⁷ The court then turned its analysis to whether the decision by the BZA was supported by substantial evidence in this case.²⁰⁸ The court observed that the BZA considered the value of closing Bell’s signal gap against the impact the cell tower would have in a rural area and concluded that allowing a cell tower in this location “was not harmonious with the appearance or intended character of the area.”²⁰⁹ In addition, the court found that Bell’s attempts to find another place to co-locate its tower were insufficient.²¹⁰

The last issue considered by the court was whether the BZA had unreasonably discriminated among the telecommunications providers by denying this conditional use permit application.²¹¹ The court found that there was no

200. *Id.* at 716.

201. *Id.* at 717-18.

202. *Id.* at 719.

203. *Id.* at 722.

204. *Id.* at 722-23.

205. *Id.* at 723 (citing 47 U.S.C. §332(c)(7)(B)(iii) (2006)).

206. *Id.*

207. *Id.* (quoting *VoiceStream Minneapolis, Inc. v. St. Croix Cnty.*, 342 F.3d 818, 830 (7th Cir. 2003)).

208. *Id.* at 724.

209. *Id.*

210. *See id.* at 726.

211. *Id.* at 728.

evidence that Bell was treated less favorably or differently from any other telecommunications company. Specifically, Bell did not identify any other carrier as a comparison on the same or similar facts.²¹²

The second cell tower case was *Porter County Board of Zoning Appeals v. SBA Towers II LLC*,²¹³ where a local board of zoning appeals denied a special exception to construct a wireless telecommunications tower. This case raised issues about whether the local board of zoning appeals adopted findings of fact in writing according to the requirements of the Porter County Unified Development Ordinance.²¹⁴ Unlike the *Dearborn County* case, the court in this case concluded that the findings of fact were not sufficient, but that it was harmless error.²¹⁵ Specifically, the record reflected that at the hearing when the Porter County Board of Zoning Appeals (the “BZA”) denied the petition for a special exception, the BZA stated that the findings of fact as prepared by its attorney were incorporated by reference into the record of the hearing; however, no written findings of fact existed when the vote was taken.²¹⁶

Twelve days after the hearing, the BZA sent written notice to SBA Towers II, LLC (“SBA”) denying the special exception and stating that the findings of fact were in BZA’s file; however, the findings of fact were not approved by the BZA until September and were not signed and put in the file until after the October 7, 2008 meeting.²¹⁷ The court concluded that the BZA did not make findings of fact as required by section 36-7-4-19(f) of the Indiana Code, but it found that this delay did not deny SBA due process.²¹⁸ Furthermore, the court stated that SBA offered no argument or evidence of how it was prejudiced by the BZA’s delay in entering the written findings of its decision beyond noting that its “failure to comply with . . . [the] statutory procedures was an abuse of discretion.”²¹⁹ The court concluded that because prejudice was not proved, the BZA’s delay in entering written findings of fact was harmless error.²²⁰

The court then turned to the question of whether or not there was “substantial evidence of probative value” which could serve as the basis for the BZA’s decision to deny the special exception.²²¹ The court recognized well-established rules of law concerning zoning cases which provide that a BZA’s findings will only be set aside if they are “clearly erroneous, meaning the record lacks any facts or reasonable inferences supporting them.”²²² The court continued, “A

212. *Id.* at 729.

213. 927 N.E.2d 915 (Ind. Ct. App. 2010).

214. *Id.* at 918-19.

215. *Id.* at 920.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 921.

decision is clearly erroneous when it lacks substantial evidence to support it.”²²³ It also noted that “evidence will be considered substantial if it is more than a scintilla and less than a preponderance.”²²⁴ The court held that the Telecommunication Act of 1996 is on equal footing with the authority granted to local boards of zoning appeals and requires the same “substantial evidence” that is required for a zoning board’s decision to be upheld.²²⁵ The court next discussed the discretionary authority given to boards of zoning appeals in certain circumstances and observed that the Porter County special exception zoning ordinance provides the BZA a great deal of discretion in making its determinations.²²⁶ The court ultimately concluded that the BZA’s findings and decision to deny SBA’s special exception petition was clearly erroneous because there was no evidence upon which to base the BZA’s decision.²²⁷

The development of wind energy as an industry in Indiana has brought about revisions to zoning ordinances throughout the state. A case considered by the Warrick County Board of Zoning Appeals gave rise to the question of whether or not a wind turbine and use of property zoned for residential use was “customary” in connection with residential property use and thus was a permitted accessory use or structure. *Hamby v. Board of Zoning Appeals of the Area Plan Commission of Warrick County*²²⁸ concerned an appeal by remonstrators of the trial court’s order supporting the Warrick County Board of Zoning Appeals (the “BZA”) and the Board of Commissioners of Warrick County (the “Commissioners”) in denying their claim for declaratory relief to prohibit the construction of a wind turbine on property in a residential zoning district.²²⁹ Through Morton Energy, the petitioners requested a variance from the Warrick County Comprehensive Zoning Ordinance to allow the construction of a wind turbine greater than the maximum height requirement required in Warrick County’s R-2 multi-family zoning district.²³⁰ The petitioners wanted to construct the wind turbine to serve as an alternate power source and reduce their electric utility expenses and contribution to greenhouse gases.²³¹ Specifically, the variance sought was a request to construct a wind turbine twenty feet higher than what was permitted by the ordinance.²³² The BZA granted the petition for the variance, and various homeowners who were remonstrators filed a petition for writ of certiorari alleging that the variance was “unsupported by substantial evidence; was arbitrary and capricious; and was in all other respects contrary to

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 922.

227. *Id.* at 925.

228. 932 N.E.2d 1251 (Ind. Ct. App. 2010), *trans. denied*.

229. *Id.* at 1251.

230. *Id.* at 1251-52.

231. *Id.* at 1252.

232. *Id.*

Indiana law.”²³³ The remonstrators also alleged that a freestanding wind turbine was “not a permitted use under the zoning ordinance in the R-2 district.”²³⁴ They argued to the trial court that the applicants did not meet the burden of demonstrating that application of the zoning ordinance would “result in ‘practical difficulties’ in the use of . . . [their] property as residential real estate.”²³⁵ The trial court adopted their argument and held that a wind turbine was “permitted as an accessory use in an R-2 district upon the proper granting of a variance.”²³⁶

The single issue before the court of appeals was whether the zoning ordinance relied upon by the homeowners prohibits the construction of a wind turbine in an R-2 district.²³⁷ The relevant ordinance stated that “[u]ses accessory to any of the above when located on the same lot and not involving the conduct of any business, trade, occupation or profession unless otherwise specified in this article”²³⁸ were considered permissible. The relevant portion of the ordinance defined “accessory use or structure” as “the term applied to the BUILDING or USE which is incidental or subordinate to and *customary* in connection with the PRINCIPAL BUILDING or USE and which is located on the same lot with such PRINCIPAL BUILDING or USE.”²³⁹ The BZA argued that the word “customary” was confined to the specific piece of property that was the subject of the zoning petition.²⁴⁰ The homeowners contended that it applied to all structures in a residential R-2 district. The court of appeals determined that the phrase “customary in connection with” for an accessory use or structure in a residential district should not be used “to prevent the implementation of new technologies in residential districts.”²⁴¹ It observed that the homeowners, as plaintiffs and appellants, did not meet their burden of proof to offer any evidence to demonstrate that residential wind turbines were not customary in Warrick County.²⁴² The court concluded, “Because we construe a zoning ordinance to favor the free use of land and will not extend restrictions by implication . . . and because the . . . [ordinance] permits accessory use structures, we conclude that a residential wind turbine that meets all of the other requirements of the . . . [ordinance] is a permitted use in the R-2 zoning district.”²⁴³

IV. LIENS AND FORECLOSURES

Whether a tenant’s leasehold interests in real estate survives forfeiture of a

233. *Id.* (citation omitted).

234. *Id.* (citation omitted).

235. *Id.* at 1253 (citation omitted).

236. *Id.* (citation omitted).

237. *Id.* at 1254.

238. *Id.*

239. *Id.* (citation omitted).

240. *Id.*

241. *Id.* at 1255.

242. *Id.*

243. *Id.* at 1256.

land contract by the purchaser and whether a seller knew or should have known that a tenant was in possession of property but did not make the tenant a party to the forfeiture action raised interesting issues of first impression for the Indiana Supreme Court during this reporting period.²⁴⁴ In *Myers v. Leedy*, the court held that a tenant's leasehold interest in real estate survived forfeiture because the tenant was not made a party to a forfeiture or foreclosure action, even though the seller (or mortgagee) knew or upon reasonable diligence should have known that the tenant was in possession of the property.²⁴⁵ The majority of the court also concluded that under the *lis pendens* doctrine, filing a forfeiture action gives third parties constructive notice of a pending lawsuit—but this does not apply to a tenant already in possession of the real estate.²⁴⁶ Chief Justice Shepard authored a concurrence, stating that

[i]mporting the open-ended idea of equity into the complicated, largely statutory system which governs the massive interests of commercial real estate mortgages, applying it to past and present financial commitments, and declaring that all subordinate unrecorded or informal possessors survive unaffected by foreclosure unless the lender undertakes to obtain service of process on all of them is really quite remarkable.²⁴⁷

Chief Justice Shepard concluded with his view that this decision was not consistent with “prevailing national doctrine” regarding mortgages and that waiting for a case involving mortgage lenders and commercial or industrial real estate would be a preferable way to address this shift in judicial policy.²⁴⁸

*Miller v. LaSalle Bank National Ass'n*²⁴⁹ was an interesting case concerning a dull subject—the recordation of mortgages with technical flaws. In *Miller*, a Chapter 13 bankruptcy trustee filed a claim to avoid a mortgage on the debtors' residence, arguing that it had been improperly recorded.²⁵⁰ The debtors gave a mortgage to Alliance, LaSalle's predecessor, secured by a lien on their home in Peru, Indiana in 2001; however, the acknowledgement was defective because it did not identify the individuals who executed the mortgage in the presence of the notary.²⁵¹ The bankruptcy trustee's 2008 claim alleged that a 2007 amendment to the Indiana mortgage statute (the “2007 amendment”), which provided that an improperly recorded mortgage could provide constructive notice of the mortgage lien to third parties (and did not render such a mortgage avoidable in bankruptcy), did not apply to the 2001 mortgage.²⁵² The bankruptcy court took the view of the trustee; however, the district court examined the 2007 amendment

244. See *Myers v. Leedy*, 915 N.E.2d 133 (Ind. 2009).

245. *Id.* at 140.

246. *Id.* at 138.

247. *Id.* at 141 (Shepard, C.J., concurring).

248. *Id.*

249. 595 F.3d 782 (7th Cir. 2010).

250. See *id.* at 784.

251. *Id.*

252. *Id.* at 785.

and reversed the bankruptcy court, holding that it applied prospectively to mortgages recorded after the amendment's effective date of July 1, 2007.²⁵³ The trustee appealed to the Seventh Circuit Court of Appeals.

The court of appeals recognized Indiana's long established rule—which follows other states' rules—that a properly acknowledged and recorded mortgage provides constructive notice to subsequent bona fide purchasers of the lien.²⁵⁴ Before the 2007 amendment, a mortgage could not be recorded if there was a technical defect in the acknowledgement because it did not provide notice as required by the statute.²⁵⁵ The court discussed the history of the 2007 amendment, recognizing that it had been adopted to provide guidance following the case of *In re Stubbs*.²⁵⁶ The court also noted that the Indiana General Assembly amended the statute again in 2008 to make it clear that it applied to all mortgages, regardless of when they were recorded.²⁵⁷

The court discussed Indiana's traditional rules of statutory interpretation.²⁵⁸ It then turned to the language of the 2007 amendment, noting that the parties in the case provided opposite interpretations of the phrase "is recorded" in subsection (c) of the 2007 amendment.²⁵⁹ Because both of the parties' arguments appeared reasonable to the court, it concluded that the statute was ambiguous.²⁶⁰ The court observed that it is possible to read "is recorded" in subsection (c) as clarifying that the subsection did not create an exception for technical violations in the acknowledgement to the mandatory recording requirement.²⁶¹ The court observed that Indiana law is settled that without "strong and compelling" reasons, a statute will not be interpreted to apply retroactively.²⁶² The court analyzed whether the 2007 amendment and the amendment adopted the following year (the "2008 amendment") were adopted to clarify the existing law or create a substantive change.²⁶³ It concluded that whether the 2007 amendment applied retroactively was ambiguous, but the fact that the 2008 amendment was adopted quickly to clarify that subsection (c) applied to all mortgages meant that the legislature intended the 2007 amendment to apply to all mortgages—including those recorded prior to July 1, 2007.²⁶⁴

253. *Id.*

254. *See id.* at 785-86.

255. *See id.* (citing IND. CODE § 32-21-2-3 (2011), which requires that a notary public authenticate signature for grantors of mortgage).

256. *Id.* at 785; *see also In re Stubbs*, 330 B.R. 717, 731 (Bankr. N.D. Ind. 2005).

257. *Miller*, 595 F.3d at 785.

258. *See id.* at 786.

259. *Id.* at 787.

260. *Id.*

261. *Id.* ("That is, reading the subsection (c) without 'is recorded,' someone might argue that subsection (c) creates an exception to both the mandatory recording requirement by subsection (a) and to the technical requirement it lists.").

262. *Id.*

263. *Id.* at 789.

264. *Id.* at 790.

A mortgage foreclosure case decided by the Indiana Supreme Court held that an equitable subrogee may not foreclose under the terms of the subrogated mortgage, recover interest provided in the mortgage, or receive attorneys' fees and costs.²⁶⁵ In *Neu v. Gibson*, Bret Gibson sold his business to John Nowak, who financed the purchase with a note secured by a second mortgage on his home.²⁶⁶ Thomas and Elizabeth Neu, who did not know about Gibson's mortgage on Nowak's home, subsequently purchased the residence from Nowak. When Nowak defaulted on his mortgage to Gibson, Gibson foreclosed.²⁶⁷ In an earlier appeal, the Indiana Court of Appeals "determined that the Neus and their lender were entitled to priority ahead of Gibson, the same position held by Nowak's first mortgagee."²⁶⁸ In the case before the supreme court, the Neus argued that this finding entitled them to interest, attorneys' fees, and costs.²⁶⁹ They further claimed "that they . . . [could] foreclose on their own home under the terms of the Nowak mortgage or, in the alternative, that they . . . [had] a right to force a sheriff's sale of the property based on Gibson's foreclosure."²⁷⁰ The trial court rejected all of these claims.²⁷¹

When Nowak sold his home to the Neus, he signed a vendor's affidavit stating that the house was free and clear of "every kind or description of lien, lease or encumbrance except a mortgage" from him to Irwin Mortgage Corporation.²⁷² Investors Titlecorp closed the transaction and performed a title search, which found the Irwin mortgage but not Gibson's mortgage.²⁷³ When Nowak closed on his sale to the Neus, he was behind on his monthly mortgage obligation to Gibson.²⁷⁴ Gibson "sued Nowak, the Neus, and Washington Mutual on Nowak's promissory note and sought to foreclose on the real estate."²⁷⁵ The Neus "cross-claimed against Nowak for breach of the warranty deed he executed" conveying the property to them.²⁷⁶ Nowak then filed for bankruptcy.²⁷⁷ The trial court denied all of the Neus' claims, and Gibson received a judgment permitting him to foreclose against the Neus' home.²⁷⁸ This judgment led the Neus to bring suit to collect interest and recover attorneys' fees under the terms of the subrogated first mortgage—or, in the alternative, to allow them to

265. *Neu v. Gibson*, 928 N.E.2d 556, 557 (Ind. 2010).

266. *Id.* at 557.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 558.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 559.

foreclose, forcing a sheriff's sale to satisfy Gibson's judgment.²⁷⁹ The court of appeals affirmed this ruling but reversed the denial of the sheriff's sale, and the supreme court then granted transfer.²⁸⁰

The supreme court held that the Neus extinguished the first mortgage and its terms when they purchased Nowak's home and satisfied his debt under that mortgage.²⁸¹ The Neus were then in the first mortgage priority lien position through equitable subrogation, and the court held that they could not foreclose or collect attorneys' fees under the terms of the mortgage that had been extinguished.²⁸² The court also held that equitable principles would also not allow the Neus to collect interest or attorneys' fees and that they could not force a sheriff's sale to satisfy Gibson's judgment of foreclosure and their own priority lien.²⁸³ Finally, the court affirmed the trial court's denial of the Neus' claims, finding that "[d]rawing the equitable subrogation line at priority" protected the Neus' interests while preserving Gibson's interest as the inferior lienholder.²⁸⁴ The court also observed that the Neus might have a cause of action against the title insurance company that failed to find Gibson's lien and reported in the title search.²⁸⁵

*Thomas v. Thomas*²⁸⁶ concerned quitclaim deeds exchanged between family members who later had a falling-out resulting in a complicated web of deeds, competing mortgages, and fraud. Benjamin Thomas purchased his home in Gary, Indiana in 1965.²⁸⁷ In 1987, as part of his retirement planning, he conveyed his home to his son David by a quitclaim deed, although he and David had an understanding that it would remain Benjamin's residence "and that he could recover title at any time upon request."²⁸⁸ In 1995, David conveyed Benjamin's home to his own son, Richard Thomas, via quitclaim deed.²⁸⁹ Benjamin and Richard "agreed that Richard would return title to the home to Benjamin upon request."²⁹⁰ Benjamin continuously occupied and possessed control over the home.²⁹¹

A few years after the conveyance to Richard (after a family fight), Benjamin requested that Richard convey title to the home back to him, but Richard refused.²⁹² Two months later, Benjamin filed notice of intention to hold a

279. *Id.*

280. *Id.*

281. *Id.* at 561.

282. *Id.* at 563.

283. *Id.*

284. *Id.* at 564.

285. *Id.*

286. 923 N.E.2d 465 (Ind. Ct. App. 2010).

287. *Id.* at 467.

288. *Id.*

289. *Id.* at 467-68.

290. *Id.* at 468.

291. *Id.*

292. *Id.*

mechanic's lien on the home in the amount of \$200,000. In September 2001, Benjamin filed a quiet title action against Richard but did not file a *lis pendens* notice contemporaneously or subsequently.²⁹³ In December of that year, Richard obtained an \$118,000 loan from Trustcorp and placed a mortgage on the home in favor of Trustcorp.²⁹⁴ Richard was living in Georgia at the time he applied for the loan, and he submitted the release of the mechanic's lien with what he said was Benjamin's signature.²⁹⁵ The release indicated that the original recording of the document was "2001 003334" when the actual number on the notice was "2001 060516."²⁹⁶ Trustcorp accepted the release, and the loan was closed.²⁹⁷ Richard did not make payments on the mortgage loan.²⁹⁸ Richard filed suit to foreclose his mechanic's lien on the home on July 3, 2002, and this suit also named Trustcorp as a defendant.²⁹⁹

In December 2003, Richard filed for bankruptcy in the Northern District of Georgia, and Benjamin intervened. As part of a mediated settlement a little over a year later, Richard conveyed the home back to Benjamin by quitclaim deed.³⁰⁰ The bankruptcy terminated Richard's obligation to Trustcorp, but it did not address Trustcorp's lien on the property.³⁰¹ In August 2007, "the trial court entered partial summary judgment in favor of Trustcorp on the issue of the validity of Benjamin's mechanic's lien."³⁰² As a result, Benjamin executed a release of the mechanic's lien and sent it to Trustcorp.³⁰³ Trustcorp at some point "conveyed the right to collect the mortgage loan to Fannie Mae and the servicing rights to EverBank."³⁰⁴ The trial court entered judgment for Benjamin, concluding that Trustcorp's mortgage on the home was invalid because the mortgage was the product of fraud (the forged mechanic's lien release).³⁰⁵ The court also found that even though Benjamin did not file a *lis pendens* notice, Trustcorp had constructive notice of its claims as a result of Benjamin's litigation with Richard and irregularities in the release of the mechanic's lien.³⁰⁶

The first issue that the court of appeals addressed was whether the trial court erred in concluding that Trustcorp's mortgage was invalid because it was not a *bona fide* mortgagee.³⁰⁷ The court observed that for one to qualify as a *bona fide*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.* at 469.

purchaser, he must be a purchaser “in good faith, for a valuable consideration, and without notice of the outstanding rights of others.”³⁰⁸ There was no dispute that Benjamin failed to file a lis pendens notice as required by the Indiana Code.³⁰⁹ Ignoring the requirement to file a lis pendens notice, the trial court found that Trustcorp was not a bona fide mortgagee because it had not acted in good faith and had constructive notice of Benjamin’s lawsuit.³¹⁰ The court of appeals concluded that Trustcorp did not act in good faith and imputed notice of Richard’s fraud and Benjamin’s lawsuit to Trustcorp. The court observed that the Indiana Supreme Court has held that “one who fails to examine land which he is about to purchase, and to inquire as to the rights of the one in possession, is not acting of good faith and will not be treated as a bona fide purchaser.”³¹¹ The court stated that if there are competing claims, the means of knowledge—with a duty of using them—are akin to knowledge itself.³¹² In addition, the court noted that the Indiana Supreme Court has held that “possession of land puts the world on notice that the possessor may have a claim of ownership and right to possession.”³¹³ The court stated that it was undisputed that Benjamin was continuously in possession of the property, but Trustcorp did nothing to find out what rights he might have had in the property. As a result, Trustcorp was not a bona fide mortgagee, and the trial court’s judgment was affirmed.³¹⁴ The court also stated that the irregularities appearing on the face of the forged release of mechanic’s lien would have put “a reasonably prudent person on inquiry notice that something was amiss.”³¹⁵ The court distinguished the type of notice that Trustcorp had from constructive notice, saying that Trustcorp could not have had constructive notice of the quiet title action because Benjamin had not filed a lis pendens notice.³¹⁶ The court of appeals concluded that given the amount of the loan, a reasonably prudent lender would have taken simple steps necessary to verify that a superior mechanic’s lien had been released, especially when the instrument had been notarized.³¹⁷

Finally, the court considered whether the trial court erred in concluding that the Trustcorp mortgage was invalid because it was the result of fraud. The court affirmed the trial court on this point as well, noting that because it found that Trustcorp could not have been a bona fide mortgagee because it did not investigate Benjamin’s interest in the property, the trial court’s decision was

308. *Id.* (quoting *Kumar v. Bay Bridge, LLC*, 903 N.E.2d 114, 116 (Ind. Ct. App. 2009), *reh’g denied*).

309. *See* IND. CODE § 32-30-11-3 (2011).

310. *Thomas*, 923 N.E.2d at 469-70.

311. *Id.* at 470 (quoting *Mishawaka, St. Joseph Loan & Trust Co. v. Neu*, 196 N.E. 85, 90 (Ind. 1935)).

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 471-72.

affirmed concerning fraud.³¹⁸

V. MISCELLANEOUS

In a case of first impression concerning the nature of a pre-closing possession agreement, *Chiprean v. Stock*,³¹⁹ the Indiana Court of Appeals determined that a prospective purchaser's pre-closing possession agreement was not a land title contract; thus, he was not entitled to demand foreclosure proceedings. *Chiprean* concerned a small claims court dispute over the Stocks' eviction action against Chiprean.³²⁰ Chiprean executed a purchase agreement for a house owned by the Stocks.³²¹ The closing on the sale was contingent upon Chiprean obtaining financing to purchase the home, which he was unable to do in spite of his desire to occupy the property.³²² Chiprean and the Stocks executed a pre-closing possession agreement (the "possession agreement") permitting Chiprean to occupy the home, provided that he made monthly payments to the Stocks. The possession agreement stated that he was purchasing the property in "as is" condition and that the Stocks had no responsibility for maintenance or repair.³²³ Chiprean was required to deposit \$5000 with the listing broker; if he did not close, the \$5000 deposit was to be forfeited to the Stocks and the listing broker.³²⁴ Chiprean did not have the home inspected prior to moving in.³²⁵

After Chiprean began occupying the home, the roof over the great room collapsed.³²⁶ The Stocks arranged to have the roof repaired using their insurance proceeds while Chiprean lived at the home.³²⁷ Chiprean was not happy with the repairs but made regular payments under the possession agreement until the roof collapsed. Thereafter, he only made partial payments or no payments.³²⁸ In January 2009, the Stocks filed a small claims action to evict Chiprean from the house.³²⁹ Chiprean consented to an immediate order of eviction on February 17, 2009, and a separate hearing was set on damages for March 25, 2009.³³⁰ Chiprean filed a counterclaim against the Stocks to recover the deposit.³³¹ The trial court entered judgment in favor of the Stocks in the amount of \$6000, and

318. *Id.*

319. 925 N.E.2d 489 (Ind. Ct. App. 2010).

320. *Id.* at 491.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.* at 491-92.

326. *Id.* at 492.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

the deposit was split between the Stocks and Chiprean's real estate broker.³³² Chiprean argued that he should not have been evicted and that the Stocks should not have been awarded damages for the missed rental payments.³³³ He asserted that his interest in the property should have been foreclosed upon pursuant to *Skendzel v. Marshall*.³³⁴ He argued that the trial court's decision resulted in a forfeiture of his interest in the property, whereas if he had been permitted to foreclose on his interest, the proceeds of the sale would be applied to the balance of the contract principal and interest owed to the Stocks.³³⁵

The court of appeals first observed that Chiprean waived his argument that a foreclosure sale should have been conducted because he consented to being "evicted" from the property with the damages to be determined at a later date.³³⁶ He did not request foreclosure of the property at any point during the trial court proceedings.³³⁷ Even without the waiver, however, the court concluded that Chiprean was not entitled to request foreclosure proceedings.³³⁸ To claim a foreclosure remedy, a "consummated" land sale contract for real estate must be in place, and the possession agreement did not amount to a land sale contract.³³⁹ In addition, the purchase agreement was contingent upon Chiprean obtaining financing, which he was not able to do.³⁴⁰ A purchase agreement contingent on financing is not enforceable until the financing is obtained.³⁴¹ As a result, the court stated that the purchase agreement was not consummated because the contingency was not satisfied.³⁴²

Although the court characterized the possession agreement as more of a lease than a land sale contract, it did not think it necessary to specifically call the pre-possession agreement a lease.³⁴³ The court was able to find one case in New York analyzing a similar pre-closing possession agreement. In the New York case, the court held that the pre-closing possession agreement did not create an equitable interest in the real estate because the agreement did not express a clear intent that the property would be held, given, or transferred as security for an obligation under the agreement.³⁴⁴ Here, the court concluded that the possession agreement provided for a limited term of possession and "the contingency required to make the purchase agreement effective never occurred."³⁴⁵ As a

332. *Id.*

333. *Id.*

334. 301 N.E.2d 641 (Ind. 1973).

335. *Chiprean*, 925 N.E.2d at 492.

336. *Id.* at 493.

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.* at 493-94.

343. *Id.* at 494.

344. *Id.* (citing *Kaya v. B & G Holding Co.*, 853 N.Y.S.2d 95, 96 (App. Div. 2008)).

345. *Id.*

result, Chiprean did not have an interest in the property permitting foreclosure.³⁴⁶ Furthermore, the \$5000 deposit required by the possession agreement was not characterized as a “down payment” to be applied to the purchase price for the property.³⁴⁷ The possession agreement specifically stated that it was a non-refundable brokerage fee and was not refundable to the buyer or seller.³⁴⁸

Another case of first impression before the Indiana Court of Appeals dealt with the authority of an agent of a title insurance company. *Fidelity National Title Insurance Co. v. Mussman*³⁴⁹ concerned a lawsuit brought by sellers of real estate against the title insurance company, its agent, and the agent’s owner, alleging theft and conversion by the agent and its owners of funds from an escrow account.³⁵⁰ Fidelity National Title Insurance Company (“Fidelity”) had an issuing agency agreement with an inter-county title company (“ITC”).³⁵¹ ITC was authorized to countersign and issue title insurance commitments and policies on behalf of Fidelity in the state of Indiana.³⁵² The agency agreement contained specific provisions concerning the authority of ITC and did not provide that ITC had authority to conduct closing and escrow services in connection with Fidelity’s title insurance policies.³⁵³ The Mussmans owned real estate in Porter County and entered into a purchase agreement to sell it to Floramo Partners (“Floramo”) in 1999 for \$1.6 million.³⁵⁴ The Mussmans agreed to provide an owner’s policy of title insurance to Floramo, and the purchase agreement provided that ITC would issue the owner’s and lender’s policies.³⁵⁵ ITC served as the closing and escrow agent on the transaction.³⁵⁶ Fidelity did not have contact with the Mussmans or Floramo, and its name did not appear on any of the closing documents or title insurance commitments. ITC issued the title insurance policies, underwritten by Fidelity, after the December 30, 1999 closing.³⁵⁷ When Fidelity became suspicious of ITC’s business practices a few months later, it “imposed additional escrow account supervision” in addition to the terms in the agent agreement.³⁵⁸

On April 30, 2000, the Mussmans presented a check for \$1.6 million drawn on ITC’s escrow account and learned that there were insufficient funds to honor the check.³⁵⁹ The Mussmans discovered later that the funds had been in the ITC

346. *Id.*

347. *Id.*

348. *Id.*

349. 930 N.E.2d 1160 (Ind. Ct. App. 2010).

350. *Id.* at 1162.

351. *Id.*

352. *Id.*

353. *Id.* at 1162-63.

354. *Id.* at 1163.

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.* at 1164.

escrow account at the time of their December 1999 closing, but they had been stolen by the owner of ITC (Lawrence Capriotti) and others as part of a Ponzi scheme.³⁶⁰ The Mussmans filed a complaint alleging conversion and theft by ITC and its owners, as well as negligence by Fidelity.³⁶¹ The Mussmans further alleged that Fidelity was liable to them for ITC's conduct under the agency theory of respondeat superior and under section 261 of the Restatement (Second) of Agency.³⁶² The court of appeals concluded that (1) Fidelity was not liable for the acts of ITC because its agency agreement specifically stated that ITC could only issue title insurance commitments and policies³⁶³ and (2) it "was not to receive any funds, 'including escrow, settlement or closing funds'" on behalf of Fidelity.³⁶⁴ The court noted that cases in other states had dealt with the question of "whether a title insurance agent is also an agent of the title insurance company with respect to escrow and closing services."³⁶⁵ For instance, courts in Maryland and Texas held that an agent was not the title insurance company's agent for closing a transaction unless the agreement between the agent and the title insurance company "establish[ed] an agency relationship for purposes of settling and closing activities undertaken by that title agent."³⁶⁶ In the case at hand, the court concluded that Fidelity did not give agency authority to ITC through its agency agreement, and it was therefore not liable for its actions.³⁶⁷

Another case of first impression concerning a title insurance company was *U.S. Bank, N.A. v. Integrity Land Corp.*³⁶⁸ In the *U.S. Bank* case, a lender sought damages from a title insurance company for negligence in failing to uncover a defect during a title search.³⁶⁹ The lender was a successor in interest to a prior lender for the property. The title insurance company claimed it had no obligation to the successor lender because there was no privity of contract between them and that the "economic loss rule" prevented the successor lender from recovering under a tort claim theory.³⁷⁰

Integrity performed a title search in connection with a February 2006 closing on the purchase of property financed by Texcorp Mortgage Bankers ("Texcorp").³⁷¹ Southern National Title Insurance Corporation ("Southern National") issued and underwrote a mortgage insurance policy based on the commitment prepared by Integrity, which did not disclose a 1998 foreclosure

360. *Id.*

361. *Id.*

362. *Id.*

363. *See id.* at 1166-68.

364. *Id.* at 1166 (internal citation omitted).

365. *Id.*

366. *Id.* at 1167 (citation omitted).

367. *Id.* at 1168.

368. 929 N.E.2d 742 (Ind. 2010).

369. *Id.* at 743-44.

370. *Id.* at 744.

371. *Id.*

judgment on the property.³⁷² After closing, the holder of that mortgage and the 1998 judgment, LPP Mortgage Ltd. ("LPP"), filed suit against the owner of the property and Texcorp to enforce and foreclose the judgment.³⁷³ U.S. Bank succeeded to Texcorp's interests and intervened in the action by filing a third-party claim against Integrity and Southern National alleging breach of contract and negligent real estate closing.³⁷⁴ The trial court entered a judgment in favor of LPP, and the property was later sold to satisfy the judgment. This left U.S. Bank without any recourse on its mortgage loan.³⁷⁵

In subsequent litigation, U.S. Bank and Integrity filed cross-motions for summary judgment, which resulted in the trial court granting U.S. Bank's motion as to Southern and denying its motion as to Integrity's liability.³⁷⁶ The trial court concluded that Integrity "was not in breach of contract because it was not a party to the title insurance policy, issued by Southern, and it was not negligent because it owed no duty to U.S. Bank in tort."³⁷⁷ Integrity had maintained throughout all of the litigation that there was no privity of contract between it and U.S. Bank.³⁷⁸ The Indiana Supreme Court agreed that there was no privity of contract and examined U.S. Bank's tort claim, an issue of first impression in Indiana, which it framed as "whether or not a title company, after issuing an incorrect title commitment . . . which the recipient . . . relied upon to its detriment, owes a duty [in tort] to the recipient to [which] it certified clear title to the subject real property."³⁷⁹

Integrity argued that U.S. Bank did not have a tort claim because no claim exists "for a mortgage company against a title company that issues an incorrect title insurance commitment to the underwriter of the insurance policy."³⁸⁰ The court discussed the economic loss theory of recovery and the fact that a defendant is not liable under a tort theory for purely economic loss caused by his negligence.³⁸¹ However, it noted that several exceptions to this rule exist, including where a duty of care is owed by a liability insurer to the insured and negligent misstatement occurs.³⁸² Noting that courts in other jurisdictions are split on this issue, the court observed that Indiana has recognized the tort of negligent misrepresentation³⁸³ and that it has ruled that "[n]egligent misrepresentation may be actionable and inflict only economic loss."³⁸⁴ The

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* at 744-45.

377. *Id.* at 745.

378. *Id.*

379. *Id.* (citation omitted).

380. *Id.*

381. *Id.*

382. *Id.* at 745-46.

383. *Id.* at 744.

384. *Id.* at 747 (citing *Greg Allen Construction Co. v. Estelle*, 798 N.E.2d 171, 174 (Ind.

court also pointed out that, consistent with its decision in *Indianapolis-Marion County Public Library v. Clark & Linard, P.C.*,³⁸⁵ whether or not a contract exists is not dispositive in determining whether a tort action is allowable where there are “carve-out” exceptions for tort liability such as negligent misrepresentation.³⁸⁶

The court concluded that Integrity had a duty under Section 552 of the Restatement (Second of Torts) to communicate the quality of the title to the real property accurately when issuing its commitment for title insurance.³⁸⁷ Furthermore, the court concluded that Integrity should have known that Texcorp, in closing the loan to the buyer, would reasonably rely on the statement in the preliminary commitment that the title was free of any liens and encumbrances.³⁸⁸ The court also stated that the relationship between Integrity and Texcorp was advisory in nature in that “Integrity had superior knowledge and expertise, was in the business of supplying title information, and was compensated for the information it provided to Texcorp.”³⁸⁹ This information was provided in response to a request by Texcorp to advise it concerning its transaction as a lender for a third party, “and Integrity affirmatively vouched for the accuracy of the information” it provided.³⁹⁰ Based on these facts, the supreme court concluded that tort law permitted U.S. Bank’s tort claim to proceed.³⁹¹

In *Kinsel v. Schoen*,³⁹² when a homeowner’s manmade pond leaked water, flooding a neighbor’s septic drainage field and causing the system to fail, the Indiana Court of Appeals was called upon to examine the common enemy doctrine and other issues relative to the flood. After Kinsel’s pond leaked water and flooded the Schoens’ property, the county health department filed an action against the Schoens and required them to replace their failed septic system.³⁹³ The Schoens received a judgment against Kinsel at trial for nuisance, trespass, and negligence.³⁹⁴ Kinsel appealed the judgment, alleging that the trial court should have applied the common enemy doctrine and that the damage award was improper because the Schoens did not mitigate their damages. He argued further that he should not have been required to pay the Schoens’ attorneys’ fees and expert witness fees.³⁹⁵

The trial court concluded that the common enemy doctrine did not apply to this situation because Kinsel built his pond without a permit; therefore, it was a

2003)).

385. 929 N.E.2d 722, 727 (Ind. 2010).

386. *U.S. Bank*, 929 N.E.2d at 748.

387. *Id.* at 749.

388. *Id.*

389. *Id.* at 750.

390. *Id.*

391. *Id.*

392. 934 N.E.2d 133 (Ind. Ct. App. 2010).

393. *Id.* at 136-37.

394. *Id.* at 137.

395. *Id.* at 141.

common nuisance.³⁹⁶ The trial court also determined that the water from Kinsel's pond "trespassed" on the Schoens' property, thereby making Kinsel liable for all damages resulting from the water flowing onto the Schoens' property.³⁹⁷ Moreover, Kinsel had admitted that his pond was losing water and had received adequate notice from the authorities that the pond was likely to cause other problems with the Schoens' septic system and drainage field.³⁹⁸ The trial court further found that because Kinsel placed his pond too close to the Schoens' septic field, he was negligent for failing to take any steps to prevent pond water infiltrating this area.³⁹⁹

On appeal, Kinsel unsuccessfully argued that the common enemy doctrine applied to this case, alleging that the Schoens' claim was "based on an overabundance of natural water from snowmelt, rainwater, surface water and groundwater entering his property."⁴⁰⁰ The court noted that the common enemy doctrine recognizes that "all property owners hold dominion over their property with respect to the control of water."⁴⁰¹ The court discussed the common enemy doctrine, observing that the "common enemy" is a source of water that is diffused over the ground "or which temporarily flows upon or over the surface as the natural elevations and depressions of the land may guide it but which has no definite banks or channel"—surface water.⁴⁰² However, Kinsel's private pond did not qualify as surface water, and experts testified at trial that the sub-surface water was radiating out from Kinsel's pond.⁴⁰³ Based on this evidence, the flood was caused by a leaking pond and not surface water.⁴⁰⁴ As a result, the common enemy doctrine did not apply.⁴⁰⁵

The court of appeals also rejected Kinsel's argument that the Schoens failed to mitigate their damages. The court noted that there was no evidence that the Schoens' actions aggravated or increased their injuries, and Kinsel did not offer any alternative to the solution required by the health department (putting in a new septic system).⁴⁰⁶ Finally, the court recognized the inherent authority that a trial court has in assessing attorneys' fees and expenses for consequential damages

396. *Id.* at 138.

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.* at 139.

401. *Id.* ("In its most simplistic and pure form[,] the rule known as the 'common enemy doctrine' declares that surface water which does not flow into defined channels is a common enemy and that each landowner may deal with it in such a manner as it suits his own convenience. Such sanctioned dealings include walling it out, walling it in and diverting or accelerating its flow by any means whatever.").

402. *Id.* at 140.

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

suffered by plaintiffs in this situation and upheld that award.⁴⁰⁷

*Marshall v. Erie Insurance Exchange*⁴⁰⁸ established that an urban or residential property owner has a duty to exercise reasonable care to prevent an unreasonable risk of harm to neighboring property owners arising from the condition of trees on his or her property.⁴⁰⁹ John and Marjorie Meyer appealed the trial court's decision denying their motion to correct error following its judgment in favor of Erie Insurance Exchange ("Erie") on Erie's claims for damages. Erie's claims resulted from a tree on the Marshalls' property that fell and damaged the home of Cindy Cain.⁴¹⁰ The court of appeals concluded that the trial court did not abuse its discretion in denying the Marshalls' motion to correct error.⁴¹¹

The Marshalls owned several properties and were partners in a property management business called Multivest Properties.⁴¹² John made management decisions for the rental properties that he and Marjorie owned, particularly after she became seriously ill in 2006.⁴¹³ The City of Elkhart would contact John concerning cleaning up debris on a particular property, and John would take care of the issue regardless of whether he or Marjorie actually owned the property.⁴¹⁴ Marjorie owned a vacant lot next to Cain's home, and a tree stood near the boundary line between the two lots.⁴¹⁵ When Cain purchased the home, she had concerns about the tree's health and the potential danger it posed to her home.⁴¹⁶ She called the Elkhart Code Enforcement Office and expressed her concern about the tree.⁴¹⁷ The city contacted Marjorie's property manager to inform her that the tree needed to be taken down and spoke directly with John, who hired a professional arborist to examine the tree.⁴¹⁸ The arborist testified at trial that he did not see enough evidence of decay to warrant removing the tree.⁴¹⁹ On December 31, 2006, the tree fell onto Cain's house, knocking over the chimney, and causing damage to the roof and the structure of the house.⁴²⁰ Cain filed an insurance claim with Erie, who reimbursed her for the repairs to the home minus her deductible.⁴²¹ Then Erie, as a subrogee for Cain, sued the Marshalls for

407. *Id.* at 142.

408. 923 N.E.2d 18 (Ind. Ct. App.), *aff'd on reh'g*, 930 N.E.2d 628 (Ind. Ct. App.), *reh'g denied*, 940 N.E.2d 830 (Ind. 2010).

409. *Id.* at 26.

410. *Id.* at 20.

411. *Id.* at 21.

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.*

damages arising from their alleged negligence in maintaining the tree.⁴²² The trial court concluded that the Marshalls owed Cain a duty of reasonable care and breached this duty.⁴²³

The court noted that this case presented an issue of first impression concerning whether an urban or residential landowner owes a duty to protect neighbors from damage caused by a tree falling from the landowner's property.⁴²⁴ The court observed that the Indiana Supreme Court had adopted section 363 of the Restatement (Second) of Torts in the case of *Valinet v. Eskew*,⁴²⁵ stating:

(1) Except as stated in Subsection (2), neither a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land.

(2) A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to present unreasonable risk of harm arising from the condition of trees on the land near the highway.⁴²⁶

The court stated that on initial review, the Restatement and the rule from *Valinet* did not appear to imply a duty on the Marshalls to protect Cain from the tree; however, the court stated that this view would leave property owners in residential or urban areas without recourse where a neighbor "refused to remove or secure an obviously decayed and dangerous tree simply because it was a natural condition of the land."⁴²⁷ The court observed that several other states have departed from strictly applying the rule from the Restatement "when an urban or residential landowner has actual or constructive knowledge of a dangerous condition."⁴²⁸ The court noted that the rule in the Restatement evolved during a time "when land was mostly unsettled and uncultivated."⁴²⁹ It also concluded that it would not be an extraordinary burden to require a landowner "to inspect his or her property and take reasonable precautions against dangerous natural conditions."⁴³⁰ The court concluded that the trial court correctly applied

422. *Id.*

423. *Id.* at 22.

424. *Id.* at 23.

425. 574 N.E.2d 283 (Ind. 1991).

426. *Id.* at 285.

427. *Marshall*, 923 N.E.2d at 23.

428. *Id.*

429. *Id.* at 24.

430. *Id.*

the duty of reasonable care to the Marshalls with respect to preventing damage cause by the fallen tree and did not abuse its discretion when it denied the Marshalls' motion to correct error.⁴³¹ Finally, the court concluded that there was deficient evidence that the Marshalls breached their duty of care based upon their knowledge of the potential dangerous nature of the tree.⁴³²

431. *Id.* at 25.

432. *Id.*

RECENT DEVELOPMENTS IN INDIANA TAXATION SURVEY 2010

LAWRENCE A. JEGEN, III*

INTRODUCTION: SOME REFERENCES USED IN THIS ARTICLE

This Article highlights the major tax developments that occurred through the calendar year of 2010. Whenever the term “GA” is used in this Article, such term refers only to the second regular session of the 117th Indiana General Assembly. Whenever the term “Governor” is used in the Article, such term refers only to the Governor of Indiana who was serving in office during the second regular session of the 117th General Assembly. Whenever the term “Tax Court” is referred to in this Article, such term refers only to the Indiana Tax Court. Whenever the term “DLGF” is used in this Article, such term refers only to the Indiana Department of Local Government Finance. Whenever the term “IBTR” is used, such term refers only to the Indiana Board of Tax Review. When the term “Department” is used, such term refers only to the Indiana Department of State Revenue. Whenever the term “IC” or “Indiana Code” is used, such term refers only to the Indiana Code in effect at the time of the publication of this Article. Whenever the term “EDGE” is used, such term refers only to the “Economic Development for a Growing Economy” tax credit. Whenever the term “CRED” is used, such term refers only to Indiana’s “Community Revitalization Enhancement District” tax credit. Whenever the term “CAGIT” is used, such term refers only to the Indiana county adjusted gross income tax. Whenever the term “COIT” is used in this Article, such term refers only to the Indiana county option income tax. Whenever the term “LOIT” is used in this article, such term refers to the local option income tax. Whenever the term “IEDC” is used, such term refers only to the Indiana Economic Development Corporation. Whenever the term “CEDIT” is used, such term refers only to the Indiana county economic development income taxes. Whenever the term “IEDIT” is used, such term refers only to the Indiana economic development income tax. Whenever the term “BMV” is used in this Article, such term refers only to the Indiana Bureau of Motor Vehicles. Whenever the term “IRC” is used, such term refers only to the Internal Revenue Code which was in effect at the time of the publication of this Article. Whenever the term “AOPA” is used in this Article, such term refers only to the Indiana Administrative Orders and Procedures Act. Whenever the term “CBTCPR” is used, such term refers only to the County Board of Tax and Capital Projects. Whenever the term “PTABOA” is used in this Article, such term refers only to a property tax assessment board of appeals.

I. INDIANA GENERAL ASSEMBLY LEGISLATION

The 117th GA passed several pieces of legislation affecting various areas of

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state and local taxation, including property taxes, riverboat and racino taxes, sales and use taxes, state income taxes, state inheritance taxes, business taxes, and local taxes.

A. Property Tax

The GA enacted a variety of changes to the property tax scheme. However, most of the amendments to the property tax laws are technical, and it takes an individual knowledgeable about property taxes to fully understand these amendments.

For example, the GA amended IC 6-1.1-4-4.5 to alter the method for assessing agricultural land.¹ Specifically, the statute was amended to require a six-year rolling average instead of a four-year rolling average, and it eliminated in calculating the rolling average the year among the six years for which the highest market value in use of agricultural land was determined.² This amendment was to be applied retroactively to January 1, 2010.³

The GA enacted new legislation in order to clarify, for property tax purposes, that the term “mobile home community” has the same meaning as that set forth by IC 16-41-27-5.⁴

The GA also placed a greater burden on an assessor to explain why changes are made to the underlying characteristics of an assessment by enacting new legislation that requires the assessor to document “changes [to] the underlying parcel characteristics, including age, grade, or condition, of a property, from the previous year’s assessment date.”⁵ The assessor is also required to document the reason each change is made. On appeal, the assessor has the burden of proving that each change was valid.⁶ This legislation was effective upon passage.

The GA amended IC 6-1.1-4-5 to clarify that a petition for reassessment of real property under this statute applies only to the most recent real property assessment date.⁷ Furthermore, upon receipt of such a petition, the DLGF may either order or conduct a reassessment. These provisions did not take effect until January 1, 2011.⁸

The GA also amended IC 6-1.1-4-13.6 to alter the method for reviewing land values determined by a county assessor.⁹ As of January 1, 2011, a petition for the review of the land values determined by a county assessor under this statute may be filed with the DLGF no later than forty-five days after the county assessor

1. 2010 Ind. Acts 1341-42.

2. *Id.* at 1342.

3. *Id.*

4. *Id.* at 1371.

5. *Id.*

6. *Id.*

7. *Id.* at 1372.

8. *Id.*

9. *Id.* at 1373-75.

makes the determination of the land values.¹⁰ The statute requires that the petition must be signed by at least the lesser of: “(1) one hundred . . . property owners in the county; or (2) five percent . . . of the property owners in the county.”¹¹ Upon receipt of such a petition, the DLGF shall review the land values determined by the county assessor and, after a public hearing, shall approve, modify, or disapprove the land values at issue.¹²

The GA also amended IC 6-1.1-4-31 with regard to the DLGF’s ability to check local assessment activities by eliminating the DLGF’s power to rescind a previously ordered state-conducted assessment or reassessment that was ordered under this statute.¹³

The GA amended IC 6-1.1-5-16 to require a landowner to pay the outstanding taxes on all parcels when requesting that tax parcels be consolidated.¹⁴ This provision did not take effect until July 1, 2011.¹⁵

The GA amended IC 6-1.1-12-26 to limit the amount the owner of real property or a mobile home which is equipped with a solar energy heating or cooling system may deduct annually from the assessed value of such property.¹⁶ The amount is now limited to an amount equal to the “out-of-pocket expenditures by the owner (or a previous owner) of the real property or mobile home for: (1) the components; and (2) the labor” for such system.¹⁷

The GA amended IC 6-1.1-12-37 to include a deck or patio, a gazebo, or another residential yard structure within the term “homestead” for assessments made after 2009.¹⁸ A swimming pool is specifically excluded from this updated definition.¹⁹

The GA provided an additional tax deduction by enacting new legislation that allows for a county fiscal body to pass an ordinance allowing a deduction for personal property within a certified technology park.²⁰ In order to qualify, the personal property must be assessed for the first time after December 31, 2010 and must be located within a certified technology park. The personal property must be “primarily used to conduct high technology activity” and “not part of the assessed value for which a personal property tax allocation has been made [under another IC section].”²¹ The IEDC must review such an ordinance and determine whether it is in the best interest of the development of the certified technology

10. *Id.* at 1374.

11. *Id.*

12. *Id.* at 1374-75.

13. *Id.* at 1376.

14. *Id.* at 1378.

15. *Id.*

16. *Id.* at 1382-83.

17. *Id.*

18. *Id.* at 1389.

19. *Id.*

20. *Id.* at 1389-90.

21. *Id.* at 1390.

park to permit the deduction.²²

In an effort to provide more public oversight, the GA amended IC 6-1.1-17-20 to require a public library to “submit its proposed budget and property tax levy to the county fiscal body,” rather than to a city or town fiscal body, “if more than fifty percent . . . of the parcels of real property within the jurisdiction of the public library are located outside the city or town.”²³ However, the GA also amended IC 6-1.1-17-20.5 so that this requirement does not apply if a public library seeks to “issue bonds or enter into a lease payable in whole or in part from property taxes” and the decision with regard to these transactions was approved before December 31, 2010.²⁴

The GA amended IC 6-1.1-18.5-1 to allow the DLGF to adjust the city or county’s maximum permissible ad valorem property tax levy for the ensuing calendar year if the city or county requesting the adjustment had an actual levy that was lower than the city or county’s maximum permissible ad valorem property tax levy for the calendar year immediately preceding the request because the city or county had used cash balances.²⁵ The DLGF may make such adjustment for property taxes first due and payable after December 31, 2010.

In addition, the GA amended IC 6-1.1-18.5-10.5 to allow the DLGF to increase the maximum permissible ad valorem property tax levy that would otherwise apply to a civil taxing to allow the civil taxing unit to meet its obligations to a fire protection territory.²⁶

The GA made a technical amendment to IC 6-1.1-20-3.2 and IC 6-1.1-20-3.5 to require that a political subdivision provide notice to the circuit court clerk prior to entering into a transaction that would require increased property taxes to pay for a “controlled project.”²⁷

The GA also amended IC 6-1.1-20-3.6 to require a county election board to submit the language of a public question to the DLGF for review.²⁸ The DLGF shall then review the language of the public question to evaluate “whether the description of the controlled project is accurate and is not biased against either a vote in favor of the controlled project or a vote against the controlled project.”²⁹ The DLGF has the authority to recommend that the ballot language be used as submitted or modified to ensure that the description of the controlled project is appropriate and is not biased. After reviewing any recommendations of the DLGF, the county election board must act to approve the ballot language.³⁰ This amendment applies to a public question submitted after June 30, 2010.

The GA amended IC 6-1.1-24-1.2 to require a taxpayer to pay “delinquent

22. *Id.*

23. *Id.* at 1393.

24. *Id.* at 1394.

25. *Id.* at 1396.

26. *Id.* at 1397-98.

27. *Id.* at 1404.

28. *Id.* at 1415.

29. *Id.*

30. *Id.*

taxes and special assessments due before the date on which the property” is listed for tax sale in order to remove the property from the tax sale.³¹ A partial payment does not remove the property from a tax sale unless the county auditor has the authority under IC 6-1.1-24-1.2(c) to enter into a mutually satisfactory arrangement with the taxpayer for the payment of delinquent taxes.³²

In an effort to assist taxpayers with property tax disputes, the GA enacted new legislation to allow an employee of the IBTR to assist taxpayers and local officials in their attempts to voluntarily resolve disputes in which a taxpayer has challenged an action of a township or county official.³³ If an IBTR employee provides such assistance to a taxpayer, the employee may not act as an administrative law judge or participate in a decision relating to the taxpayer’s dispute. The IBTR is authorized to establish procedures for IBTR employees assisting in resolving these disputes.³⁴

The GA amended IC 6-1.1-12-1 to clarify that in order for a taxpayer to claim the mortgage deduction for property tax purposes, the mortgage, installment loan, or home equity line of credit upon which the deduction is based must be recorded in the county recorder’s office.³⁵

The GA amended IC 6-1.1-20-1.9 to define the term “owner of property” as a person that owns “(1) real property; (2) a mobile home assessed as personal property, used as a principal place of residence, . . . or (3) a manufactured home assessed as personal property, used as a principal place of residence.”³⁶ The GA also amended IC 6-1.1-20-3.1, IC 6-1.1-20-3.2, and IC 6-1.1-20-3.5 to conform to this definition.

In an effort to coordinate changes to the tax levy, the GA amended IC 20-46-1-7 to require a school corporation to notify the DLGF of a resolution that reimposes or extends a tax levy.³⁷

In an effort to streamline the collection of provisional taxes, the GA amended IC 6-1.1-22.5-6 to adjust the manner in which provisional property taxes can be assessed by a county assessor.³⁸ In addition, the GA amended IC 6-1.1-22.5-8 to allow for the payment of provisional property taxes in two equal installments.³⁹ Also, the GA amended IC 6-1.1-22.5-9 to authorize the county treasurer to mail a provisional statement one time per year so long as the statement is mailed at least “fifteen . . . days before the date on which the first installment is due.”⁴⁰

The GA enacted new legislation related to vacant parcels subject to tax sale

31. *Id.* at 1422.

32. *Id.*

33. *Id.* at 1423.

34. *Id.*

35. *Id.* at 925.

36. *Id.* at 635-36.

37. *Id.* at 652.

38. *Id.* at 1073-74.

39. *Id.* at 1076-77.

40. *Id.* at 1081.

in Indianapolis, Indiana.⁴¹ In an effort to streamline the tax sale process, the new statute establishes procedures by which a contiguous landowner may purchase a vacant parcel and consolidate into the landowner's original parcel, as well as providing authority to the county legislative body to establish criteria for the identification of vacant parcels to be offered for tax sale under this statute.⁴²

The GA amended IC 6-1.1-25-4 to clarify that a tax deed for real property sold in a tax sale does not extinguish an "easement recorded before the date of the tax sale . . . regardless of whether the easement was taxed . . . separately from the real property."⁴³ Furthermore, the tax deed "conveys title subject to all easements recorded before the date of the tax sale."⁴⁴

The GA amended IC 6-1.1-24-1 to move the date by which a county treasurer must certify a list of delinquent properties to the county auditor from July 1 to January 1.⁴⁵

The GA also amended IC 6-1.1-24-6.1 to require a person redeeming a delinquent parcel to pay all costs of sale, advertising costs, and other expenses of the county directly attributable to the tax sale.⁴⁶

In addition, the GA amended IC 6-1.1-24-7 to allow a person seeking to claim a tax sale surplus to do so only as "directed by the court having jurisdiction over the tax sale of the parcel for which the surplus claim is made."⁴⁷ The court may grant such a claim only on petition by the claimant and if such petition is filed "within three . . . years after the date of sale of the parcel in the tax sale."⁴⁸

The GA also enacted new legislation related to agreements between property owners and third parties that has the primary purpose of compensating the third party for locating, delivering, recovering, or assisting in "the recovery of money deposited in the tax sale surplus fund."⁴⁹ In such an instance, the agreement is valid only if compensation is limited to "not more than ten percent . . . of the amount collected from the tax sale surplus fund . . . ; . . . is in writing; . . . is signed by the property owner; and . . . clearly sets forth" the amount available to the property owner.⁵⁰ This new statute only applies to agreements entered into on or after May 1, 2010.⁵¹

The GA amended IC 6-1.1-24-9 to allow a county executive to "assign a certificate of sale held in the name of the county executive to any political subdivision during the life of the certificate."⁵² The period of redemption

41. *See id.* at 1158.

42. *Id.*

43. *Id.* at 1162.

44. *Id.*

45. *Id.* at 1419.

46. *Id.* at 809.

47. *Id.* at 810.

48. *Id.*

49. *Id.*

50. *Id.* at 811.

51. *Id.*

52. *Id.* at 812-13.

following such an assignment is 120 days.⁵³ In addition, the GA amended IC 6-1.1-25-4 to correspond to IC 6-1.1-24-9.⁵⁴

Finally, the GA amended IC 6-1.1-25-11 with regard to sales

declared invalid after a claim is submitted . . . for money deposited in the tax sale surplus fund and the claim is paid, the county auditor shall . . . refund the purchase money plus six percent (6%) interest per annum . . . to the purchaser . . . and certify the amount paid to the property owner from the tax sale surplus fund as a lien against the property and as a civil judgment against the property owner.⁵⁵

B. Riverboat and Racino Taxes

The GA amended IC 4-33-12-1 to decrease the riverboat admissions tax for the riverboat at French Lick from \$4 to \$3, and it also changed the distribution of the tax revenue.⁵⁶

C. Sales and Use Tax

The GA made a number of minor changes to the Indiana Code with regard to Indiana's sales and use taxes. The majority of changes were administrative in nature.

The GA amended IC 6-2.5-1-5 to provide that telecommunications nonrecurring charges for services are not included in the definition of gross retail income.⁵⁷ In addition, the GA enacted new legislation that defined the term "telecommunications nonrecurring charges" to mean "amount[s] billed for installation, connection, change, or initiation of a telecommunications service."⁵⁸

The GA enacted new legislation codified under IC 6-2.5-4-17, which provides that "[a] person is a retail merchant making a retail transaction when the person enters into a computer software maintenance contract to provide future updates or upgrades to computer software."⁵⁹ In addition, IC 6-2.5-1-14.5 reflects new legislation that defines a computer software maintenance contract as a contractual obligation "to provide a customer with future updates or upgrades of computer software."⁶⁰

The GA amended IC 6-2.5-4-16.4 to provide that "[t]he sale of a digital code that may be used to obtain a product transferred electronically shall be taxed in the same manner as the product transferred electronically."⁶¹ This code section

53. *Id.* at 813.

54. *Id.*

55. *Id.* at 815-16.

56. *Id.* at 1135.

57. *Id.* at 1425.

58. *Id.* at 1426.

59. *Id.* at 1427.

60. *Id.* at 1425.

61. *Id.* at 1427.

also defines “digital code” to mean a method that permits a purchaser to obtain a product transferred electronically at a later date.⁶² In addition, the GA enacted new legislation that defines the phrase “transferred electronically” as something “obtained by a purchaser by means other than tangible storage media.”⁶³

The GA also amended IC 6-2.5-2-2 to eliminate the sales tax brackets and also made a technical change to the rounding rule.⁶⁴

The GA clarified other IC sections, including IC 6-2.5-5-18, which was amended to clarify that the sale or rental of mobility enhancing equipment is exempt from the sales tax if “prescribed by a person licensed to issue the prescription.”⁶⁵ In addition, IC 6-2.5-5-20 was amended to clarify that dietary supplements are not food items that would be exempt from the sales tax.⁶⁶

The GA provided some relief to cities and towns that operate municipal golf courses by enacting new legislation providing that transactions of a city or town are exempt from the sales and use tax if the property acquired is used in the operation of a municipal golf course.⁶⁷ This new legislation is retroactive to July 1, 2007.

Finally, the GA amended IC 6-2.5-11-10 to provide that a certified service provider operating under the Streamlined Sales Tax Agreement is not liable for sales or use tax collection errors that result from reliance on the DLGF’s taxability matrix.⁶⁸

D. Adjusted Gross Income Tax

The GA clarified and adjusted a few provisions related to Indiana’s adjusted gross income tax.

The GA amended both IC 6-3-2-2.5 and IC 6-3-2-2.6 to provide that the net operating loss deduction for individuals, nonresidents, and corporations may be carried back only two years for losses incurred in 2008 and 2009.⁶⁹ These amendments differ from the IRC, which provides a five-year carry-back.⁷⁰ These provisions are to be applied retroactively to November 6, 2009.

The GA also amended IC 6-3-1-11 in order to update Indiana’s reference to the Internal Revenue Code to be the “Internal Revenue Code . . . as amended and in effect on January 1, 2010.”⁷¹ This measure was to be applied retroactively to January 1, 2010.

Finally, in an effort to streamline the tax reporting process, the GA enacted

62. *Id.*

63. *Id.* at 1426.

64. *Id.* at 1430.

65. *Id.* at 1427.

66. *Id.* at 1429.

67. *Id.*

68. *Id.* at 1429-30.

69. *Id.* at 1431-32, 1433-34.

70. *See id.*

71. *Id.* at 1431.

new legislation requiring employers to file the annual WH-3 and W-2 statements electronically if the employer files more than twenty-five withholding statements.⁷² This provision is to be applied to all statements filed after December 31, 2010.

E. Income Tax Credits

The GA passed legislation that clarified the application of certain tax credits and also granted some new opportunities for tax credits.

The GA amended IC 6-3.1-13-10 to provide that the definition of a taxpayer for purposes of the EDGE tax credit includes a taxpayer “that submits incremental income tax withholdings under IC 6-3-4-8.”⁷³ In addition, the GA amended IC 6-3.1-13-15.5 to eliminate the requirement that an existing business must have at least thirty-five employees to qualify for an EDGE credit for job retention.⁷⁴ These provisions were to be applied retroactively to January 1, 2010.

The GA also amended IC 6-3.1-19-3 to make a technical change that adds an internal reference to the CRED tax credit.⁷⁵ Also, the GA enacted new legislation to provide that the CRED tax credit does not apply to areas in Muncie, Indiana unless the advisory commission on industrial development selects the area to receive incremental withholding and incremental sales tax.⁷⁶ This new legislation also provides that the IEDC may not approve a taxpayer’s expenditures as being entitled to the credit until the IEDC receives notice from the advisory commission.⁷⁷ The provisions related to the CRED tax credit were effective upon passage.

The GA enacted new legislation that created a new employer tax credit for a corporation or pass-through entity that after December 31, 2009 either “locates or relocates the operations of a business enterprise in Indiana; incorporates or otherwise first organizes in Indiana;” or expands its operations in Indiana and employs at least ten new qualified employees.⁷⁸ This new legislation also requires the IEDC to approve taxpayers for the credit, and it provides that the credit shall be 10% of the wages paid by the new business to qualified employees during a twenty-four-month period.⁷⁹ This legislation is to be applied retroactively to January 1, 2010.

In a non-code provision, the GA repealed IC 6-3.1-13-27, thereby eliminating a nonprofit provision contained in the EDGE credit.⁸⁰ This repeal was retroactive to January 1, 2010.

72. *Id.* at 1436.

73. *Id.* at 1437.

74. *Id.* at 1294.

75. *Id.* at 1437.

76. *See id.* at 1438.

77. *Id.*

78. *Id.* at 1295.

79. *Id.* at 1298.

80. *Id.* at 1540.

Finally, in a second non-code provision, the GA created an interim study committee to study economic development methods and tax credits.⁸¹ This provision was effective upon passage.

F. Local Option Income Taxes

In an effort to provide local governments with more flexibility, the GA enacted new legislation that provided that CAGIT, COIT, or CEDIT can be adopted, increased, decreased, or rescinded if the ordinance is adopted any time between January 1 and November 1.⁸² This new legislation provided effective dates for such ordinances as well.

G. Inheritance and Estate Taxes

In an effort to clarify the reporting requirements imposed on a taxpayer, the GA amended IC 6-4.1-4-0.5 to specify the requirements of an affidavit used to state that no inheritance tax is due after applying statutory exemptions to each transferee receiving property as a result of the decedent's death.⁸³

The GA also amended both IC 6-4.1-4-1 and 6-4.1-4-7 to require that both resident and non-resident inheritance tax returns include all taxable transfers known to the person filing the return.⁸⁴

H. Aircraft Registration

The GA enacted new legislation that allows for an aircraft to be registered in Indiana without payment of the use tax.⁸⁵ This provision holds if "the aircraft was registered in another state as of January 1, 2010, and any sales or use tax due in the registration state was paid and ownership of the aircraft has not changed after December 31, 2009."⁸⁶ There also must be no outstanding liability in the registration state that relates to the aircraft, and an application for an Indiana registration must be filed between June 30 and September 30 of 2010.⁸⁷

I. Innkeeper's Tax

The GA amended IC 6-9-2-2 to correct a conflict in the Lake County Innkeeper's Tax statute. This amendment was effective upon passage.⁸⁸

81. *Id.* at 1551-53.

82. *See id.* at 1453.

83. *Id.* at 162.

84. *Id.* at 164.

85. *Id.* at 1453.

86. *Id.*

87. *Id.*

88. *Id.* at 1454.

J. Other Provisions

The GA also passed a number of other provisions affecting various aspects of tax policy. For instance, the GA amended IC 36-7-13-12 to establish a third community revitalization enhancement district in Muncie, Indiana.⁸⁹ This amendment was effective upon passage.

The GA also enacted new legislation that allowed for only two of the three CRED tax credit districts in Muncie to receive incremental sales and withholding taxes as determined by the advisory commission.⁹⁰ The advisory commission is required to notify the budget agency as to which districts are selected to receive the allocation.⁹¹

The GA amended IC 36-7-32-11 to provide that if a certified technology park is not recertified by the IEDC, the IEDC is required to notify the county auditor, the DLGF, and the Department.⁹²

The GA enacted IC 36-8-16.6-12, which imposes an enhanced prepaid wireless telecommunications service charge.⁹³ The fee is one-half of the wireless emergency enhanced 911 fee. The fee is to be collected by the seller of prepaid wireless telecommunications service when such services are sold to another person.⁹⁴ Prepaid wireless telecommunications service is defined by the statute as a telecommunication service that provides the right to use mobile wireless service that must be paid for in advance and is sold in predetermined units or dollars.⁹⁵ The fee is imposed on each retail transaction. The seller is required to remit the fee to the DLGF at the time and in the manner prescribed by the DLGF. The fee is exempt from the utility receipts tax. A seller is provided a collection allowance of 1% of the fees that are collected by the seller.⁹⁶ The DLGF, in conjunction with the wireless enhanced 911 advisory board, is required to establish procedures governing the collection and remittance of the fee in accordance with procedures used for listed taxes. The DLGF must take into consideration the difference between large and small sellers and may establish lower thresholds for the remittance of the fee by small sellers.⁹⁷ The term “small seller” is defined by the statute as a seller “that sells less than one hundred dollars . . . of prepaid wireless telecommunications services each month.”⁹⁸ By January 1, 2011, the DLGF is required to determine the amount of fees collected and remitted for prepaid wireless telecommunications by a commercial mobile radio

89. *Id.* at 1508.

90. *Id.* at 1278.

91. *See id.*

92. *Id.* at 1520.

93. *Id.* at 1521.

94. *Id.*

95. *Id.* at 1527.

96. *Id.* at 1528.

97. *Id.*

98. *Id.* at 1529.

service provider during the period from July 1, 2008 through June 30, 2010.⁹⁹ The DLGF is required to ascertain the total amount of fees collected for prepaid wireless telecommunications for the period from July 1, 2010 through June 30, 2012 by January 1, 2013. If the amount determined for the period from July 2010 through June 2012 is less than the amount determined from July 2008 through June 2010 by more than 5%, the fee will sunset and no longer apply.¹⁰⁰

II. INDIANA TAX COURT DECISIONS

The Tax Court rendered a variety of opinions from January 1, 2010 to December 31, 2010. Specifically, the Tax Court issued seventeen published opinions and decisions: eight of which concerned the Indiana real property tax,¹⁰¹ five of which concerned the inheritance tax,¹⁰² two of which concerned the sales and use tax,¹⁰³ one of which concerned the personal property tax,¹⁰⁴ and one of which concerned the utility services use tax.¹⁰⁵ The Tax Court also issued ten unpublished opinions: six of which concerned Indiana real property tax,¹⁰⁶ one of which concerned the sales and use tax,¹⁰⁷ one of which concerned the personal property tax,¹⁰⁸ one of which concerned the corporate income tax,¹⁰⁹ and one of which concerned the utility services use tax.¹¹⁰ A summary of each opinion and decision appears below.

A. Real Property Tax

1. *Holsapple v. Monroe County Assessor*.¹¹¹—E.L. and B.L. Holsapple (the “Holsapples”) appealed the IBTR’s final determination regarding their real property assessment for the 2006 and 2007 tax years. The IBTR issued a final determination on May 8, 2009 in which it valued the Holsapples’ real property for the 2006 and 2007 tax years. An appeal was filed on July 3, 2009, and the Monroe County Assessor moved to dismiss the Holsapples’ appeal because it was not timely filed under Indiana Code section 6-1.1-15-5.¹¹²

Indiana Code section 6-1.1-15-5 requires a taxpayer to file a petition with the Tax Court no later than forty-five days after the IBTR gives notice of its final

99. *Id.* at 1529-30.

100. *Id.* at 1530.

101. *See supra* Part I.A.

102. *See supra* Part I.B.

103. *See supra* Part I.C.

104. *See supra* Part I.D.

105. *See supra* Part I.J.

106. *See supra* Part I.A.

107. *See supra* Part I.C.

108. *See supra* Part I.D.

109. *See supra* Part I.E.

110. *See supra* Part I.J.

111. 918 N.E.2d 783 (Ind. T.C. 2010).

112. *Id.* at 783-84.

determination.¹¹³ The Monroe County Assessor argued that the Holsapples had until June 25, 2009 to comply with all of the notice requirements provided under the statute. The Monroe County Assessor further argued that because the Holsapples' petition was not filed until July 3, 2009, the Tax Court lacked jurisdiction to hear the appeal.¹¹⁴ In response, the Holsapples maintained that they had originally filed a handwritten petition on June 22, 2010, but the clerk of the court had returned these documents for reformatting. The Holsapples reformatted the documents and resubmitted them to the clerk. The Holsapples argued that the Tax Court should recognize the original filing date and consider the reformatted petition to be an amendment to that filing.¹¹⁵ The Tax Court held that the Monroe County Assessor was correct and cited Indiana law that states, "[I]f a taxpayer fails to comply with any statutory requirement for the initiation of an original tax appeal, the tax court does not have jurisdiction to hear the appeal."¹¹⁶ The Tax Court further rejected the Holsapples' argument, explaining that even if the Holsapples' reformatted petition related back to the original filing, the Holsapples had failed to comply with the notice provisions of Indiana Code section 6-1.1-15-5.¹¹⁷

2. *Allport v. Fulton County Assessor*.¹¹⁸—Sharon L. Allport ("Allport") owned real property on Lake Manitou near Rochester, Indiana. Allport's 2006 property tax bill reflected an increase in her real property tax liability because the Fulton County Assessor had changed the classification of her property from "off-water" to "on-water."¹¹⁹ Allport filed an appeal with the Fulton County PTABOA, and the PTABOA denied her appeal. Allport subsequently filed an appeal with the IBTR. The IBTR issued a final determination affirming the assessment. Allport then filed an original tax appeal with the Tax Court claiming that the IBTR erred in upholding the Fulton County Assessor's valuation of Allport's property.¹²⁰

Allport's argument essentially focused not on the value of her property, but instead on the fact that because her property had been classified differently than her neighbors' properties, her taxes were unfair.¹²¹ The Fulton County Assessor responded that, like Allport's property, her neighbors' properties had also been incorrectly classified as "off-water." The Fulton County Assessor further argued that while Allport's neighbors would enjoy the benefit of an incorrect classification for a year more than Allport, it was irrelevant. The Tax Court held that Allport had failed to present any evidence during the IBTR hearing that would establish that the assessed value was incorrect. Furthermore, the Tax

113. IND. CODE § 6-1.1-15-5(c) (2011).

114. *Holsapple*, 918 N.E.2d at 784.

115. *Id.*

116. *Id.* (quoting IND. CODE § 33-26-6-2(a)).

117. *Id.* at 784-85.

118. 919 N.E.2d 1251 (Ind. T.C. 2010).

119. *Id.* at 1251.

120. *Id.* at 1251-52.

121. *Id.* at 1252.

Court held that there was no sound reason to award Allport the benefit of an incorrect assessment.¹²²

3. *Guingrich v. Allen County Assessor*.¹²³—Ronald O. Guingrich (“Guingrich”) owned real property consisting of a residence located on one acre of the land and other primarily wooded acreage. For the 2006 tax year, the Allen County Assessor reclassified Guingrich’s land from woodland to excess residential acreage, resulting in a significant increase in assessed value.¹²⁴ Guingrich subsequently appealed this assessment to the Allen County PTABOA. The PTABOA denied this appeal, and Guingrich timely filed an appeal with the IBTR. The IBTR issued its final determination denying Guingrich’s request for relief based on his argument that the land was for agricultural use, finding that pursuant to Indiana Code section 6-1.1-4-13(a), the land could only be assessed as agricultural if it was “devoted to agricultural use.”¹²⁵ Guingrich timely filed his original tax appeal.¹²⁶

On appeal, Guingrich argued that the IBTR’s final determination was not supported by substantial evidence. Specifically, Guingrich claimed that based on the evidence, a reasonable mind would conclude that he used his land for agricultural purposes. The Tax Court agreed with Guingrich.¹²⁷ The Allen County Assessor presented a DLGF memorandum during the IBTR hearing, outlining a fact-sensitive inquiry to determine whether Woodland was “devoted” to an agricultural use.¹²⁸ For example, “firewood harvesting may be deemed an agricultural use when certain evidence or factors are present.”¹²⁹ The Tax Court found that Guingrich had presented such evidence. First, Guingrich had testified that the reason he had purchased the land was because he intended to harvest firewood when he retired. Guingrich also produced an aerial photograph from the USDA Farm Services Agency website showing that his farm number was 9167. Finally, the Tax Court found that while Guingrich had left the land in its original state until he was ready to begin his harvesting activities, upon commencing those activities, he reported this income on his federal income tax returns.¹³⁰ Therefore, the Tax Court held that the IBTR’s final determination was not supported by substantial evidence.¹³¹

4. *Meijer Stores Ltd. Partnership v. Smith*.¹³²—In 2000, Meijer Stores Ltd. Partnership (“Meijer”) opened a discount retail store in Richmond, Indiana, which, along with its parking lot, sat on twenty-six acres of land. Meijer timely

122. *Id.* at 1253.

123. No. 49T10-0812-SC-68, 2010 WL 1064372 (Ind. T.C. Mar. 14, 2010).

124. *Id.* at *1.

125. *Id.* at *2 (quoting IND. CODE § 6-1.1-4-13(a) (2011)).

126. *Id.*

127. *Id.* at *3.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at *4.

132. 926 N.E.2d 1134 (Ind. T.C. 2010).

filed petitions for review with the Wayne County PTABOA, arguing that the assessments for years 2002, 2003, and 2005 were too high. The PTABOA subsequently upheld those assessments; thereafter, Meijer timely filed petitions for review with the IBTR.¹³³ Meijer presented an appraisal during the IBTR hearing to show that the market value-in-use of its property was significantly lower for the 2002, 2003, and 2005 tax years. The appraisal employed the cost approach, the income approach, and the sales comparison approach to estimate the value of Meijer's property. The Wayne County Assessor and the PTABOA presented no evidence during the IBTR hearing.¹³⁴ The sales comparison and income approach analyses were rejected by the IBTR because they utilized properties that were not "comparable" to Meijer's property. Meijer's obsolescence analysis was rejected because it found that Meijer failed to show that "its property was subject to the market forces that caused certain retail properties to lose value."¹³⁵ Meijer timely filed an appeal to challenge that final determination.

On appeal, Meijer argued that the IBTR "erred in rejecting its obsolescence analysis and its sales comparison analysis, as there was no evidence in the record that indicated that the analyses were unreliable."¹³⁶ In response, the Wayne County Assessor argued that the IBTR's final determination was proper because several parts of the appraisal were entitled to no weight.¹³⁷ The Tax Court found that the IBTR improperly rejected Meijer's sales comparison analysis because in formulating an estimate of value under the sales comparison approach, an appraiser need only "locate [] sales of comparable [] properties and adjust [] the selling prices to reflect the subject property's total value."¹³⁸ The Tax Court held that it was "improper to discount the appraisal's sales comparison approach because 'secondary users' purchased vacated big-box properties instead of entities like Wal-Mart."¹³⁹

As to the IBTR's rejection of Meijer's obsolescence analysis, the court explained that obsolescence is a form of depreciation that takes into account "the functional or economic loss of value to property, which is then expressed as a percentage reduction to an improvement's replacement cost new."¹⁴⁰ The court found that Meijer had based its entire argument with regard to obsolescence on the fact that there were a limited number of buyers for properties of this size and an oversupply of big-box properties within the retail market, but Meijer had presented no evidence that the market trends presented actually impacted or affected the Meijer store at issue in this appeal, or even Meijer stores in

133. *Id.* at 1135.

134. *Id.*

135. *Id.* at 1136 (citation omitted).

136. *Id.* (citation omitted).

137. *Id.*

138. *Id.* at 1137 (quoting REAL PROPERTY ASSESSMENT MANUAL 13 (2004)).

139. *Id.*

140. *Id.*

general.¹⁴¹ The court further found that the Wayne County Assessor presented no evidence or argument that refuted that testimony, but instead argued that Meijer's building was not old enough to be entitled to an obsolescence adjustment.¹⁴² Based on these findings, the Tax Court held that the IBTR's decision on this issue was not based on substantial evidence.¹⁴³ In support of this holding, the Tax Court explained that Meijer had effectively presented evidence in support of its appraisal, and the Wayne County Assessor failed to present any market-based evidence that supported its own assessment and discounted Meijer's appraisal.¹⁴⁴

5. *Stinson v. Trimas Fasteners, Inc.*¹⁴⁵—In 2002, Trimas Fasteners, Inc. ("Trimas") owned and occupied a manufacturing facility situated on forty-four acres of land in Frankfort, Indiana. The Washington Township Assessor in Clinton County (the "Assessor") valued the Trimas property at \$7,762,600. Trimas filed an appeal with the Clinton County PTABOA seeking to lower the assessment.¹⁴⁶ The PTABOA reduced the assessment to \$7,212,300. Trimas timely filed an appeal with the IBTR seeking to lower the assessed value still further. At the administrative hearing on the matter, Trimas presented an appraisal and testimony that estimated that on January 1, 1999, the market value-in-use of Trimas's property was \$2,960,000.¹⁴⁷ The Assessor, in response, presented two appraisals testifying that the market value-in-use of Trimas's property was \$8,000,000 on March 1, 2002 and \$8,100,00 on July 31, 2003. The IBTR reduced Trimas's assessment to \$2,960,000 based on Trimas's appraisal. The IBTR found this appraisal to be more accurate because it was based on the Uniform Standards of Professional Appraisal Practice (USPAP) and had valued the property January 1, 1999, the proper valuation date.¹⁴⁸ The Assessor timely filed an appeal.

The Tax Court gave great deference to the IBTR's final determination. Furthermore, the court stated that when there are "competing opinions as to how a property should be valued, the [IBTR] . . . must determine which opinion is more probative" by persuading the IBTR "that its value opinion is more credible and reliable than that of the other."¹⁴⁹

However, the Assessor challenged the IBTR's evaluation of the competing appraisals. In considering the Assessor's challenge, the court first examined why the appraisals were so different.¹⁵⁰ The court found one primary difference between the sides: the appraisal presented by Trimas concluded that its property suffered from external obsolescence, while the Assessor's appraisals disagreed.

141. *Id.* at 1138-39.

142. *Id.* at 1138.

143. *Id.*

144. *Id.* at 1139.

145. 923 N.E.2d 496 (Ind. T.C. 2010).

146. *Id.* at 497.

147. *Id.*

148. *Id.* at 498.

149. *Id.* at 502.

150. *Id.* at 499.

Trimas's conclusion of external obsolescence rested upon the selection and use of properties within each appraisal's sales-comparison approach to value.¹⁵¹ The Trimas appraisal utilized the sale of similar properties throughout Indiana involving fee simple transactions and concluded that there was external obsolescence because the market was saturated with manufacturing facilities for sale.¹⁵² The Assessor's appraisals arrived at the opposite conclusion by examining six sales of industrial facilities located in Indiana. All of these sales occurred with leases in place. Therefore, the Assessor asserted that the IBTR erred in adopting the Trimas appraisal because the Trimas property was, in fact, being used by its owner while the comparable properties in the Trimas appraisal were vacant. The court, however, found that the IBTR "did not ignore the Assessor's evidence; it simply found Trimas's evidence to be more persuasive."¹⁵³

6. *Meyers v. Kosciusko County Assessor*.¹⁵⁴—William Meyers ("Meyers") occupied residential lakefront property on Dewart Lake in Syracuse, Indiana. In 2007, the property's assessed value increased to \$314,600—a significant increase over the previous year. The Kosciusko County Assessor attributed the increase to Meyers' land being reclassified as "lakefront."¹⁵⁵ Meyers filed an appeal with the Kosciusko County PTABOA challenging the reclassification. The PTABOA reduced the assessment to \$293,200. Meyers timely filed an appeal with the IBTR. At the IBTR hearing on the matter, Meyers argued that: (1) his friends owned more expensive property, and their taxes had not increased; (2) property values nationwide had plummeted; (3) the governor and other legislators had proclaimed that his property tax liability was supposed to decrease; and (4) his assessment was disproportionate to what he had paid for the property in 1975.¹⁵⁶ The IBTR rejected these arguments, and Meyers timely filed an original tax appeal.

On appeal, Meyers repeated his four arguments.¹⁵⁷ As the court explained, Indiana real property is assessed on the basis of its market value-in-use, and the taxpayer is required to provide probative evidence demonstrating what a property's market value-in-use would have been at the time of assessment.¹⁵⁸ Meyers provided no such evidence to the IBTR, and therefore, the Tax Court refused to find the IBTR's final determination erroneous.

7. *Pachniak v. Marshall County Assessor*.¹⁵⁹—In 2006, Lawrence and Glenda Pachniak (the "Pachniaks") purchased residential property on Lake Maxinkuckee in Culver, Indiana for \$1,175,000. The property consisted of four parcels: two were lakefront, and two sat across the street. In 2006, the Marshall County

151. *Id.*

152. *Id.* at 501.

153. *Id.*

154. No. 49T10-0909-TA-56, 2010 WL 1806692 (Ind. T.C. Mar. 6, 2010).

155. *Id.* at *1.

156. *Id.*

157. *Id.* at *2.

158. *Id.*

159. 928 N.E.2d 655No. 49T10-0904-TA-18, 2010 WL 2284248 (Ind. T.C. June 8, 2010).

Assessor valued the Pachniaks' property at \$1,182,700.¹⁶⁰ The Assessor classified all four parcels as "lakefront" while applying a negative 50% influence for the parcels that sat across the street, which accounted for "traffic flow" and "size and shape." The Pachniaks appealed to the Marshall County PTABOA, arguing that classification of two non-lakefront parcels was erroneous because they were not located on the lake.¹⁶¹ The PTABOA denied their appeal, so the Pachniaks timely filed an appeal with the IBTR. At the IBTR hearing, the Pachniaks argued that the assessments of their across-the-street parcels were inconsistent with the assessments of similar properties located nearby.¹⁶² The IBTR affirmed the assessment, and the Pachniaks timely filed an original tax appeal.

On appeal, the Pachniaks argued that the IBTR "erred when it failed to reclassify their two across-the-street parcels so that their assessed values were more in line with the assessed values of other similarly situated parcels."¹⁶³ The court rejected this argument, holding that taxpayers are required to produce "objectively verifiable evidence demonstrating what their property's market value-in-use actually is."¹⁶⁴ The court further found that the Pachniaks' property assessment was in line with its purchase price of \$1,175,000 and that there was nothing in the administrative record showing how much, if any, of that purchase price represented the two parcels that sat across the street.¹⁶⁵ Therefore, the court affirmed the assessment.

8. *Country Acres Ltd. Partnership v. Pleasant Township Assessor*.¹⁶⁶—Country Acres Ltd. Partnership ("Country Acres") owned an apartment complex in LaPorte, Indiana situated on approximately seven acres of land.¹⁶⁷ The complex primarily served tenants who benefited from federal subsidized housing programs. The Pleasant Township Assessor/LaPorte County Assessor (collectively, the "Assessor") assessed Country Acres's property at \$3,336,200 in 2004. Country Acres appealed the assessment to the LaPorte County PTABOA and eventually, to the IBTR.¹⁶⁸ Country Acres presented two analyses during those proceedings to prove that there was an error in the assessment. The first analysis estimated that the property's market value-in-use was \$836,921 as of January 1, 1999.¹⁶⁹ The second analysis, prepared in conformance with the USPAP, estimated the property's market value to have been \$2,200,000 on June 28, 2005. Both analyses employed the income approach to value.¹⁷⁰ In contrast, the Assessor's analysis established the market value-in-use of the Country Acres

160. *Id.* at *1.

161. *Id.*

162. *Id.*

163. *Id.* at *2 (citation omitted).

164. *Id.*

165. *Id.*

166. No. 71T10-0903-TA-5, 2010 Ind. Tax LEXIS 27 (Ind. T.C. July 19, 2010).

167. *Id.* at *1.

168. *Id.* at *2.

169. *Id.*

170. *Id.* at *2-3.

complex at \$2,393,000 on January 1, 1999. The Assessor's analysis also employed the income approach. The IBTR issued a final determination in which it reduced Country Acres's assessment to \$2,135,900.¹⁷¹ In doing so, the IBTR concluded that after applying a 7% trending factor, the Country Acres second analysis was the best evidence of the property's market value-in-use on the date of assessment. The IBTR found the Assessor's appraisal to be unreliable.¹⁷² Country Acres timely filed an original tax appeal.

On appeal, Country Acres claimed that the IBTR abused its discretion when it concluded that the Country Acres second appraisal best reflected the complex's market value-in-use. Country Acres argued that the IBTR had overstepped its authority by linking the probative value of the first analysis to the fact that it had been prepared on a contingent fee basis.¹⁷³ Country Acres further argued that the evidence did not support the IBTR's finding that the first analysis miscalculated the replacement reserve estimate and also applied the wrong capitalization rate.

As to the contingency fee issue, the court disagreed with this position, explaining that "the contingent nature of an expert witness's fee goes to the weight, not the admissibility, of the expert's testimony."¹⁷⁴ Furthermore, as the finder of fact, the IBTR was responsible for weighing the evidence and judging the credibility of witnesses, and the court refused to reweigh the evidence.

As to the replacement reserve estimate, the court found that the accuracy of the replacement reserve estimate calculation in the first appraisal did not simply depend on the appraiser's methodology in formulating the estimate, but instead required an examination of the facts underlying the analysis.¹⁷⁵ The administrative record showed that the use of the replacement reserve estimate utilized in the first appraisal had been previously questioned by the Assessor's representatives due to the manner in which apartment complexes typically handle replacement or repair of reserve items.¹⁷⁶ In the apartment management industry, a reserve fund is not normally maintained. Furthermore, the second appraisal stated that Country Acres "historically" engaged in the practice of repairing and replacing items without maintaining a reserve. The court held that these facts suggested that Country Acres's repair expenses, as reported on its balance sheets, most likely "included expenses that should have been categorized as reserves."¹⁷⁷ The court held that it would not disturb the IBTR's resolution of an issue if it was supported by enough relevant evidence.

As to the capitalization rate, the court explained that "[t]he valuation of property is the formulation of an opinion; it is not an exact science."¹⁷⁸ The IBTR was faced with determining which opinion presented was more probative. In this

171. *Id.* at *3.

172. *Id.* at *6.

173. *Id.* at *8.

174. *Id.* (quoting *Wirth v. State Bd. of Tax Comm'rs*, 613 N.E.2d 874, 877 (Ind. T.C. 1993)).

175. *Id.* at *11.

176. *Id.*

177. *Id.* at *12.

178. *Id.* at *14.

case, the court reviewed the written evidence and found that the IBTR did not err in rejecting the capitalization rate utilized in the first appraisal, as it was consistent with its findings.¹⁷⁹

Country Acres prevailed on one issue. Country Acres argued that the IBTR had erroneously reduced the assessment on its property to \$ 2,135,900 because the IBTR had miscalculated the application of a 7% trending factor to the figure presented by the second appraisal.¹⁸⁰ After reviewing the math, the court held that only a 3% trending factor was applied, and when a 7% trending factor was applied, the final market value-in-use would be \$ 2,056,075. This issue was remanded to the IBTR so that it could instruct the appropriate assessing officials to assess the subject property consistent with a 7% trending factor.¹⁸¹

9. *DeKalb County Eastern Community School District v. DLGF*.¹⁸²—The DeKalb County Eastern Community School District (the “District”) is a public school corporation located in DeKalb County, Indiana. On August 18, 2008, the District adopted its proposed budget for 2009, estimating the tax rate needed to finance its capital projects fund.¹⁸³ The District asked the DLGF to approve its budget. The DLGF reduced the tax rate applicable to the District’s capital projects fund levy according to Indiana Code section 6-1.1-18-12. The District timely protested reduction. The DLGF denied the protest, and the District timely filed an original tax appeal.¹⁸⁴

Pursuant to Indiana Code section 20-46-6-5, the tax rate applicable to any school corporation’s capital projects fund levy “is capped at a maximum rate of \$0.4167 per each \$100 of assessed valuation within the taxing district.”¹⁸⁵ The maximum rate is subject to adjustment each year based on a statutory formula provided in Indiana Code section 6-1.1-18-12. The District challenged how this formula is to be applied. Specifically, the District questioned the meaning of the term “actual percentage increase” as used in the statute.¹⁸⁶ The District argued that the phrase should be interpreted to mean actual increases only, and if there is no increase in a District’s assessed value from year to year, a zero value should be used in the formula. Conversely, the DLGF asserted that the use of a zero value in the formula ignored the fact that when the maximum capital projects fund rate was calculated for 2009, there were two years accounted for in the formula in which the assessed value of property actually decreased, and the use of a zero value was an inaccurate reflection of the actual change in the District’s assessed value.¹⁸⁷ The court held that the DLGF’s position was contrary to the rules of statutory construction generally applied by the court when faced with

179. *Id.*

180. *Id.* at *15.

181. *Id.*

182. 930 N.E.2d 1257 (Ind. T.C. 2010).

183. *Id.* at 1258.

184. *Id.* at 1258-59.

185. *Id.* at 1259 (citing IND. CODE § 20-46-6-5 (2011)).

186. *Id.* at 1260.

187. *Id.*

such a question.¹⁸⁸ The court further explained that when faced with a question of statutory construction, its function is to determine and implement the intent of the legislature in enacting that statutory provision, and in doing so, it will normally rely on the plain language of the statute. Therefore, the court gave great weight to the legislature's intentional use of the phrase "actual percentage increase" in the statutory formula.¹⁸⁹ Given the actual language used in Indiana Code section 6-1.1-18-12, the court held that the phrase "actual percentage increase" means increase only, and if there is no increase, a zero value should be used.¹⁹⁰

10. *Brown v. DLGF*.¹⁹¹—On January 20, 2009, Gregg Township (the "Township"), in northwest Morgan County, Indiana, issued a resolution authorizing the Township to enter into a loan for up to \$250,000. The funds would allow the fire department to reinstate EMS personnel, restoring the ambulance service that was eliminated in 2007.¹⁹² Dora Brown, Ben Kindle, and Sonjia Graf (the "Petitioners") challenged the need for such a loan by filing objections to the Township's authorization of loan with the Morgan County Auditor (the "Auditor"). The matter was forwarded to the DLGF. The DLGF conducted a hearing on the matter and issued a final determination approving the loan but reducing the amount from \$250,000 to \$120,806.¹⁹³ The Petitioners timely filed an original tax appeal.

On appeal, the Petitioners presented four arguments in support of their position that the Township's loan resolution must be reversed. First, they argued that the board's resolution was void ab initio because one member who voted to approve the loan was not a resident of the Township. Second, the Petitioners argued that the Township's contract with the fire department was prohibited by statute.¹⁹⁴ Third, they argued that there was no evidence supporting the DLGF's finding that emergency services were needed. Fourth, and finally, the Petitioners contended that "with the DLGF's approval of the loan resolution, the Township will unfairly bear the entire cost for the fire department's provision of ambulance service."¹⁹⁵

As to the first issue, the court explained that the Indiana Constitution requires that "[a]ll county, township, and town officers shall reside within their respective counties, townships and towns[.]"¹⁹⁶ but there is a well-recognized exception if the officer's removal or absence is merely temporary.¹⁹⁷ The evidence suggested that the board member whose residency was in question had abandoned his

188. *Id.*

189. *Id.* at 1261.

190. *Id.*

191. No. 49T10-0909-TA-52, 2010 Ind. Tax LEXIS 34 (Ind. T.C. Aug. 31, 2010).

192. *Id.* at *2.

193. *Id.* at *2-3.

194. *Id.* at *4.

195. *Id.*

196. *Id.* at *5 (quoting IND. CONST. art. VI, § 6).

197. *Id.* (citing *Relender v. State ex rel. Utz*, 49 N.E. 30, 32 (Ind. 1898)).

residence only temporarily until it could be repaired. Therefore, the court found that it was the Petitioners' burden to rebut the evidence and the Petitioners had not done so.¹⁹⁸

As to the Township being statutorily prohibited from contracting with the fire department for emergency services, the Petitioners cited Indiana Code section 36-8-13-3, arguing that the statute provided townships with authority to provide firefighting services only. The court disagreed, holding that "to the extent a township board may contract for the provision of emergency ambulance services and emergency medical services, it may contract with a volunteer fire department to provide those services."¹⁹⁹

As to the Petitioners' contention that the evidence did not support the DLGF's finding that the need for emergency services existed, the court cited Indiana Code section 36-6-6-14(d), which outlines certain factors that a township board or any reviewing authority should consider when approving additional borrowing. The court therefore gave great deference to whatever factor or reason the DLGF used to justify its final determination, since no single factor deserved more weight or was dispositive as long as its reasoning was supported by substantial evidence. The court found that the evidence in the administrative record supported the Township's desire to obtain quicker response times to the emergency needs of township residents, and hence, the DLGF's decision was justified.²⁰⁰

Finally, as to the Petitioners' contention that the Township would unfairly bear the entire cost for the fire department's provision of ambulance services, the court noted that during the administrative hearing, the Petitioners presented evidence demonstrating that the fire department responded to calls outside of the township. Therefore, the Petitioners argued, to the extent the fire department also was the primary responder for other jurisdictions, the other jurisdictions should bear a portion of the overall cost associated with the fire department's provision of ambulance services.²⁰¹ The court found that the DLGF's final determination failed to address this issue whatsoever.²⁰² Therefore, the court remanded the matter to the DLGF.

11. 6787 Steelworkers Hall, Inc. v. Scott.²⁰³—6787 Steelworkers Hall, Inc. ("Local 6787"), an affiliate of the United Steelworkers of America, had been a domestic not-for-profit corporation since 1967, recognized as a 501(c)(5) organization by the Internal Revenue Service.²⁰⁴ During the relevant year, Local 6787 owned and operated a banquet facility and a union hall in Portage, Indiana. The Porter County Assessor (the "Assessor") assessed the property at \$3,554,800: \$344,300 for the land and \$3,210,500 for the improvements. Local 6787

198. *Id.* at *7.

199. *Id.* at *11 (internal citation omitted).

200. *Id.* at *14-15.

201. *Id.* at *20.

202. *Id.* at *22.

203. 933 N.E.2d 591 (Ind. T.C. 2010).

204. *Id.* at 592.

subsequently applied for an educational purposes exemption with the Assessor on the banquet facility, the union hall, the land, and the personal property.²⁰⁵ The Porter County PTABOA issued a final determination concluding that Local 6787's union hall, the personal property, and the land were exempt from taxation, but the banquet facility was 100% taxable.

Local 6787 filed a petition for review of exemption with the IBTR. During a hearing before the IBTR, Local 6787 presented substantial amounts of evidence with regard to the actual use of the banquet facility, especially those uses that coincided with charitable purposes.²⁰⁶ The IBTR issued a final determination concluding that Local 6787 had not demonstrated that the banquet facility was predominately used for educational or charitable purposes, but instead, the banquet facility was mainly used to promote the employment interests of Local 6787's membership. Local 6787 timely filed an original tax appeal.²⁰⁷

On appeal, Local 6787 asserted that because its union activities were charitable, that made the use of the facility charitable as well. The court, however, disagreed with that assertion.²⁰⁸ The court noted that Local 6787 did not support its argument with any Indiana statute, case law, or any other persuasive authority. Furthermore, the court explained that the fact that Local 6787's union hall had qualified for a property tax exemption in the past did not mean that its banquet facility should automatically be deemed exempt.²⁰⁹ The court found that there was no evidence presented to the IBTR "as to how the educational or charitable uses of the union hall coincided with the uses of the banquet facility."²¹⁰ In addition, the court held that while Local 6787's by-laws indicated some charitable and educational intent as to the organization, such intent did not establish predominant use of the facility. Finally, the court found that "Local 6787's educational uses of the banquet facility . . . were insufficient to support a finding of . . . charitable use because the facility was used for such activities less than . . . [fifty] percent of the time."²¹¹ Based on this reasoning, the court found that the IBTR did not err in denying the exemption.²¹²

12. *Scopelite v. DLGF*.²¹³—In September 2007, the City of Hammond (the "City") adopted a budget and correlating property tax levy for 2008. In May 2008, the Auditor of Lake County, Indiana (the "Auditor") posted a notice to City taxpayers of the new property tax rates to be charged under the approved property tax levy.²¹⁴ Shortly thereafter, a group of taxpayers, including Dale J. Scopelite and James T. Sheehan (collectively, "Petitioners"), appealed the increased rates

205. *Id.*

206. *Id.* at 593-94.

207. *Id.* at 594.

208. *Id.* at 595-96.

209. *Id.* at 596.

210. *Id.*

211. *Id.*

212. *Id.*

213. 939 N.E.2d 1138 (Ind. T.C. 2010).

214. *Id.* at 1140.

by filing an objection statement with the Auditor. The taxpayers argued that the City had recklessly spent money for the past several years, “forcing taxpayers to make up the shortfall through higher property taxes.”²¹⁵ The matter was passed on to the DLGF. The DLGF held a hearing; its final determination denied the taxpayers’ petition and approved the City’s 2008 budget. In so doing, the DLGF did not address each of the taxpayers’ objections individually; instead, it addressed them collectively as four distinct issues.²¹⁶ Petitioners timely filed an original tax appeal.

On appeal, Petitioners presented four issues for the court to consider. First, Petitioners argued that they were denied due process by the DLGF when it conducted its hearing on the taxpayers’ objection statement. Second, the Petitioners argued that DLGF did not follow the law when it failed to provide written determinations and statements on each of the taxpayers’ fifty-nine objections.²¹⁷ Third, Petitioners argued that the DLGF erred in failing to conclude that the City had exceeded its debt limit. Fourth, Petitioners claimed that the DLGF had erroneously approved the City’s budget.

As to the first issue, the Petitioners argued that the DLGF, by statute, should have conducted its hearing on the taxpayers’ objection no later than February 15, 2008, but the DLGF did not conduct its hearing on the taxpayers’ objection petition until October 30, 2008. As a result, the Petitioners claimed that they had been denied due process.²¹⁸ The court rejected this argument. In doing so, the court reasoned that the February 15 deadline set forth in Indiana Code section 6-1.1-17-16(h) is not mandatory since the statute does not specify adverse consequences if the deadline is not met.²¹⁹ Such an omission in the statute led the court to conclude that the “legislature’s purpose behind the specified date is simply to keep the budget process ‘moving along’ and, ultimately, to ensure that the DLGF has final review on both budgets and taxpayer objections thereto.”²²⁰ The court also found, with respect to the Petitioners’ allegation that the City implemented its budget prior to the DLGF’s hearing on October 30, 2008, that there was no evidence in the record to substantiate that allegation.

As to the second issue, “the Petitioners argued that pursuant to Indiana Code . . . [section] 6-1.1-17-13, the DLGF was required to provide written determinations and statements on each of the fifty-nine objections.”²²¹ The court disagreed, finding that the statute cited by the Petitioners did not require that the DLGF’s final determination or statement of findings be in a specific format.

As to the third issue, the Petitioners argued that the DLGF’s final determination was erroneous because the DLGF incorrectly calculated the City’s

215. *Id.*

216. *Id.* at 1141.

217. *Id.* at 1143.

218. *Id.* at 1142.

219. *Id.* at 1143.

220. *Id.*

221. *Id.* (citation omitted).

debt and failed to determine that the City exceeded its debt limit.²²² The court explained that the Petitioners bore the burden of proving that the DLGF's final determination was invalid, and they had failed to produce any evidence from the administrative record to meet this burden.²²³ The court also found that the Petitioners' argument incorrectly interpreted Indiana Code section 36-1-15-2(2) with regard to debt limitations for political subdivisions and that the Petitioners had failed to show that the DLGF erred in calculating the amount of debt to which the City was allowed.²²⁴

Finally, as to the fourth issue, the Petitioners argued that they provided specific instances to the DLGF where the City's budget was inaccurate during their objection hearing. The Petitioners argued that the DLGF failed to rectify the mistakes even after the Petitioners alerted them. The court explained that when reviewing a DLGF final determination, it will give the DLGF's determination great deference as long as it is supported by substantial evidence.²²⁵ The court found, after reviewing the transcript and evidence from the DLGF hearing, that the budget issues of which the Petitioners complained were really nothing more than "unsupported allegations, conclusory statements, open-ended questions, and opinions" as to how money would be better spent.²²⁶ Therefore, the court would not find that the DLGF erred with regard to the City's budget. The court affirmed the DLGF's final determination in its entirety.²²⁷

13. *Hubler Realty Co. v. Hendricks County Assessor*.²²⁸—Hubler Realty Company ("Hubler") owned three contiguous parcels of land ("Parcels 195-1, 195-2, and 197-1") in Plainfield, Indiana. Parcels 195-1 and 197-1 were occupied by an automobile service center, and a commercial garage sat on Parcel 197-1. For tax year 2006, Parcel 195-1 was assessed at \$1,011,400; Parcel 195-2 was assessed at \$173,300; and Parcel 197-1 was assessed by the Hendricks County Assessor (the "Assessor") at \$453,500.²²⁹ Hubler timely filed three petitions for review with the Hendricks County PTABOA, alleging that its assessments were inaccurate because the three parcels should have been assessed as a single property.²³⁰ The PTABOA held a hearing and issued three final determinations in which it adjusted the assessments of Parcels 195-1 and 195-2 because "the land delineations on . . . the [two] parcels were incorrect."²³¹ The PTABOA's determination decreased the overall assessed value of Hubler's three parcels from \$1,638,200 to \$1,553,000.²³²

222. *Id.* at 1144.

223. *Id.* at 1145.

224. *Id.* at 1145-46.

225. *Id.* at 1147.

226. *Id.*

227. *Id.*

228. 938 N.E.2d 311 (Ind. T.C. 2010).

229. *Id.* at 312.

230. *Id.*

231. *Id.*

232. *Id.* at 313.

Unsatisfied, Hubler timely filed three petitions for review with the IBTR. Hubler's appraisal, presented during the IBTR hearing, valued the properties at \$1,375,000. The PTABOA argued in response that Hubler's sales disclosure form demonstrated that the assessed value of the properties was not too high.²³³ The IBTR's final determination "explained that the totality of the evidence . . . demonstrated that the PTABOA's assessments did indeed reflect the properties' market values-in-use."²³⁴ Hubler timely filed an original tax appeal.

On appeal, Hubler called for reversal of the IBTR's final determination because it sanctioned selective reappraisal and sales chasing. The court, however, found that the certified administrative record failed to show that the Assessor or the PTABOA applied either selective reappraisal or sales chasing in determining the market values-in-use of Hubler's parcels.²³⁵ The court explained that "[w]hen a taxpayer elects to challenge its assessment, it assumes a certain degree of risk, as resolution of a property tax appeal may lead to an increase in assessment."²³⁶ Also, each party to an appeal uses probative evidence in order to prove to the IBTR that its valuation best reflects a property's market value-in-use.²³⁷ The court found that the evidence revealed that the Assessor's initial \$1.6 million valuation of Hubler's properties was a result of Indiana's annual trending process and not the product of "sales chasing, spot assessments, or selective reappraisals."²³⁸ Rather, the evidence suggested that both the Assessor and the PTABOA reviewed Hubler's sales disclosure form in order to determine whether the properties were overvalued for assessment purposes. Finally, the court found that the IBTR reached its conclusions by weighing the evidence presented by both Hubler and by the PTABOA, which is within the purview of the IBTR.²³⁹

14. *Shelby County Assessor v. Shelby's Landing-II, LP*.²⁴⁰—In 2006, Shelby's Landing-II, LP ("Shelby LP") owned two low-income apartment complexes in Shelbyville, Indiana. The complexes were completed in early 2006 and commenced operations shortly thereafter. Both complexes were designed as low-income housing in order to qualify for federal tax credits under the IRC. Shelby LP awarded those tax credits to project investors over a period of ten years.²⁴¹ In exchange, Shelby LP agreed to "rent all of the units in each of the complexes to individuals whose income was . . . [sixty] percent or less of the county's median gross income . . . and subject to Indiana Housing Finance Authority rental guidelines" for a period of thirty years.²⁴² The Shelby County Assessor (the "Assessor") assigned the larger complex an assessed value of

233. *Id.*

234. *Id.* (citation omitted).

235. *Id.* at 314.

236. *Id.* (citation omitted).

237. *Id.*

238. *Id.* at 314-15.

239. *Id.* at 315.

240. No. 49T10-1004-TA-17, 2010 WL 4950099 (Ind. T.C. Dec. 6, 2010).

241. *Id.* at *1.

242. *Id.*

\$7,434,600, and the smaller complex was assessed at \$1,761,200.²⁴³ Shelby LP disagreed with these values and filed petitions for review—first with the Shelby County PTABOA, and then with the IBTR.

During the IBTR hearing, Shelby LP presented an appraisal using the income approach, which estimated that as of January 1, 2005, the market value-in-use of the larger complex was \$3,100,000. This value was calculated after applying a capitalization rate of 11.05% to the complex's estimated net operating income of \$368,048.²⁴⁴ That rate was "derived from the capitalization rates of several recently sold conventional apartment complexes and a 2.3% local tax rate adjustment."²⁴⁵ This appraisal estimated the market value-in-use of the other complex at \$642,500, applying the same methodology as the other appraisal, but employing a 10.28% capitalization rate.²⁴⁶ The Assessor argued that the appraisals were unreliable due to the use of flawed capitalization rates. The IBTR issued a final determination that for 2006, the larger complex should have been assessed at \$3,100,000, and the smaller complex should have been assessed at \$642,500.²⁴⁷ The Assessor timely filed an original tax appeal.

On appeal, the Assessor claimed that the IBTR's final determination should be reversed because it ignored evidence presented by the Assessor and failed to address the Assessor's challenges to Shelby LP's appraisals. In support of this claim, the Assessor argued that the Shelby LP appraisals used net operating income estimates that were not based on aggregate market data and that the appraisals' capitalization rates were based on incomparable market rent apartment complexes.²⁴⁸

The court explained that the IBTR had found the Assessor's first argument unpersuasive because it was inconsistent with evidence presented by the Assessor. The IBTR had also found that the Assessor had failed to present probative evidence as to the inaccuracy of the appraisal data.²⁴⁹ Therefore, the court held that the administrative record supported the IBTR's finding.

As to the Assessor's position on the capitalization rates, the court explained that the IBTR found this position ineffective because Shelby LP's overall evidentiary presentation was consistent with the properties' market values-in-use.²⁵⁰ Therefore, the court held that the administrative record supported the IBTR's finding as well.

Finally, the court explained that the act of valuing real property is not an "exact science" and that when faced with "competing opinions as to how a property should be valued, the . . . [IBTR] determines which opinion is more

243. *Id.*

244. *Id.*

245. *Id.* (citation omitted).

246. *Id.* (citation omitted).

247. *Id.* at *2.

248. *Id.*

249. *Id.* at *3.

250. *Id.*

probative.”²⁵¹ The court found that the evidence clearly supported the IBTR’s final determination, and therefore, the court could not find that the IBTR erred in valuing Shelby LP’s two apartment complexes.²⁵²

B. Inheritance Tax

1. *Indiana Department of State Revenue v. Estate of Parker*.²⁵³—In May 1983, Doris Parker and her husband, Roy Parker, executed four warranty deeds in order to convey the family farm to their children, but reserving life estates to themselves. Roy died in January 1984. In December 1006, Doris died intestate and was survived by her two children.²⁵⁴ Doris Parker’s estate (the “Estate”) timely filed an Indiana inheritance tax return reporting that the total fair market value of the family farm was \$1,230,950 and that \$307,737.50 represented the fair market value of Doris’s life estates used to compute Doris’s children’s inheritance tax liabilities.²⁵⁵ The Estate did not attach a formal appraisal to the return. The Hendricks County Inheritance Tax Appraiser (the “Appraiser”) issued a report that the information in the return was correct. Based on this report, the probate court entered an order determining inheritance tax due.²⁵⁶

In January 2008, the Inheritance Tax Division of the Indiana Department of State Revenue (the “Department”) petitioned for rehearing and for a redetermination of the inheritance tax (the “Petition”) with the probate court. The Department claimed that the Estate had incorrectly computed the children’s inheritance tax liabilities and did not include an appraisal with its return.²⁵⁷ At the hearing on the Petition, the Department identified only two issues: first, whether Indiana Code section 6-4.1-4-1 and Indiana Administrative Code title 45, section 4.1-4-3 “required the Estate to file an appraisal with its inheritance tax return;” and second, whether Indiana Code section 6-4.1-2-4 and Indiana Administrative Code title 45, section 4.1-2-7 required the children’s “inheritance tax liabilities to be based on the fair market value of the family farm, not merely the fair market value of Doris’s life estates.”²⁵⁸ The probate court held that a formal appraisal was not required, but that the Estate must submit a determination of fair market value of the Estate’s assets. The probate court also held that the children had received less than a fee interest upon the death of Doris, and therefore, their inheritance tax liabilities should be based on Doris’s life estates.²⁵⁹ The Department timely filed an appeal with the Tax Court.

On appeal, the Department asserted that the probate court’s decision with

251. *Id.* at *4.

252. *Id.*

253. 924 N.E.2d 230 (Ind. T.C. 2010).

254. *Id.* at 231.

255. *Id.*

256. *Id.* at 232.

257. *Id.*

258. *Id.*

259. *Id.*

regard to the appraisal requirement must be reversed because the Estate's inheritance tax return did not comply with Indiana Code section 6-4.1-4-1 as clarified by Indiana Administrative Code title 45, section 4.1-4-3. The court held that this statute did not require the Estate to obtain an appraisal valuing its assets at their fair market value, nor did it require the Estate to file such an appraisal with its inheritance tax return.²⁶⁰ In support of this holding, the court stated, "If the legislature had intended for the Estate to substantiate its own opinion as to the fair market value of its assets by attaching an appraisal to its return, it would have stated as much."²⁶¹ The court further reasoned that the documents listed under Indiana Administrative Code title 45, section 4.1-4-3 are only required to "be attached to an inheritance tax return *only if they exist*, as the existence of each of the documents is not guaranteed."²⁶²

The Department also argued that it was erroneous for the probate court to hold that the life estates alone were subject to the inheritance tax. Instead, the Department argued that the inheritance tax liability should have been based on what the children inherited—the entire fair market value of the family farm. The court agreed.²⁶³ The court reasoned that "Indiana's inheritance tax statutes impose, at the time of the decedent's death, a tax on the privilege of succeeding to certain property rights of deceased persons," and the tax should be based on the beneficial interest transferred at death.²⁶⁴ The court found that Roy and Doris Parker conveyed real property to their children, reserving life estates to themselves. The inter vivos transfers of the children's remainder interests in 1983 resulted in no inheritance tax liabilities because Doris had retained a present possessory interest in the family farm until her death. Doris's interest in the family farm extinguished upon her death, and her children automatically gained possession of the entire property.²⁶⁵

2. *Indiana Department of State Revenue v. Estate of Ogle*.²⁶⁶—Marjean Ogle died on April 13, 2008, and the Estate timely filed its Indiana inheritance tax return, reporting a total tax liability of \$1488.²⁶⁷ The Estate attached an appraisal to establish the value of real estate owned by Marjean Ogle at the time of her death. The Jasper County Inheritance Tax Appraiser determined that the information on the Estate's return was accurate, and the probate court issued an order consistent with the Estate's reported tax liability.²⁶⁸ On February 17, 2009, the Department filed a petition for rehearing, reappraisement, and redetermination of inheritance tax, claiming that the amount of tax in controversy could not be

260. *Id.* at 234.

261. *Id.*

262. *Id.* at 235 (citing *Will's Far-Go Coach Sales v. Nusbaum*, 847 N.E.2d 1074, 1078 (Ind. T.C. 2006)).

263. *Id.* at 236.

264. *Id.*

265. *Id.* at 237.

266. 923 N.E.2d 493 (Ind. T.C. 2010).

267. *Id.* at 494.

268. *Id.*

established. Following a hearing, the probate court denied the Department's petition and found that pursuant to Indiana Code section 6-4.1-4-1, the Estate was not required to file an appraisal for the real estate.²⁶⁹ The Department timely filed an appeal to the Indiana Tax Court.

On appeal, the Department asserted that it had "promulgated an administrative rule that explain[ed] how an estate is to 'indicate' the fair market value of real estate under" Indiana Code section 6-4.1-4-1.²⁷⁰ The administrative rule specifically provided that "[t]he following documentation shall be attached to the inheritance tax return: . . . [a] formal appraisal, by a licensed appraiser, setting forth the fair market value of all tangible property reported on the return."²⁷¹ Moreover, the Department argued for reversal of the probate court's order determining the Estate's inheritance tax liability because the Estate's appraisal was "insufficient."²⁷² The court held that Indiana Code section 6-4.1-4-1 did not require that an appraisal be attached to an inheritance tax return.²⁷³

3. *In re Estate of Quackenbush*.²⁷⁴—In May 2007, Forrest Quackenbush ("Forrest") died testate. Upon his death, Forrest's trust provided that the co-trustees distribute all of the annual net income and a portion of the principal in equal shares to his grandchildren, including to a grandchild who had been given up for adoption shortly after birth.²⁷⁵ On February 2, 2008, the Estate filed its inheritance tax return in February 2008, reporting that the grandchild who had been given up for adoption was Forrest's biological granddaughter and that her two sons were his great-grandsons. Therefore, the Estate had treated the grandchild and two great-grandchildren as "class A" transferees in computing its inheritance tax liability. The probate court accepted the Estate's inheritance tax return as filed.²⁷⁶

The Department filed a petition for rehearing and redetermination of inheritance tax with the probate court. The Department argued that the grandchild and her children should have been classified as "class C" transferees because they had been given up for adoption before they were emancipated. As a result, the Department claimed that the Estate owed additional inheritance tax plus interest.²⁷⁷ After a hearing, the probate court issued an order granting the Department's petition and ordered the Estate to pay the additional inheritance tax plus statutory interest.²⁷⁸ The Estate timely filed an appeal.

The Estate argued that the probate court erred in finding that the grandchild

269. *Id.*

270. *Id.* at 495.

271. *Id.* (quoting 45 IND. ADMIN. CODE 4.1-4-3(a)(6) (2011)).

272. *Id.* at 496.

273. *Id.* The court cited *Indiana Department of State Revenue v. Estate of Parker*, 924 N.E.2d 230 (Ind. T.C. 2010), which had been handed down the same day.

274. 926 N.E.2d 127 (Ind. T.C. 2010).

275. *Id.* at 128.

276. *Id.*

277. *Id.*

278. *Id.*

and her children were “class C” transferees. In support of this position, the Estate argued that “nothing within that statute or the inheritance tax statutes in general prevents an adoptee ‘from being treated as . . . a lineal descendant of . . . [a] natural ancestor . . . for inheritance tax purposes.’”²⁷⁹ In response, the Department asserted that the resolution of the issue should not be solely based upon the inheritance tax statutes, but the court should also consider the adoption, intestacy succession, and testacy succession statutes. These other statutes make clear that the legislature intended to sever the biological tie to a natural ancestor in a legal sense, and therefore, the probate court correctly held that the grandchild and her children should be classified as “class C” transferees.²⁸⁰

The court found this issue to be a matter of first impression in Indiana; therefore the court looked to other jurisdictions to see how they had addressed similar issues. The court further explained that, while not binding, each court’s analysis of “the interrelationship between its descent and devise statutes and its inheritance tax statutes” was instructive.²⁸¹

The court further explained that the “overall design of Indiana’s probate code with respect to the distribution of property is to treat an adopted child as the natural child of the adoptive parents only.”²⁸² After a thorough explanation of Indiana’s probate code, the court found that the General Assembly has unambiguously determined that for purposes of inheritance, a child adopted pre-emancipation by unrelated individuals obtains a family status equal to that of a natural child of those adoptive parents only, and the child’s biological ties to his or her natural parents are legally severed.²⁸³

The court went on to explain that Indiana Code section 6-4.1-1-3 provides that “a legally adopted child is to be treated as if the child were the natural child of the child’s adopting parent if the adoption occurred before the individual was totally emancipated.”²⁸⁴ The court considered this code section in relation to the adoption and descent and devise statutes and concluded that the probate court had correctly determined that the legislature did not intend to confer “class A” transferee status to the grandchild or her children. The court further explained that the clear thrust of Indiana’s adoption and inheritance statutes, and the case law interpreting these statutes, provides that in non-relative adoption cases, the natural parent-child relationship is legally severed.²⁸⁵ Therefore, the court refused to legitimize the familial relationship between the decedent and his previously adopted grandchild for inheritance tax purposes.²⁸⁶

4. *Indiana Department of State Revenue v. Estate of Boehle*.²⁸⁷—On

279. *Id.* at 129 (citation omitted).

280. *Id.*

281. *Id.*

282. *Id.* at 130 (citation omitted).

283. *Id.*

284. *Id.* (quoting IND. CODE § 6-4.1-1-3(d) (2011)).

285. *Id.* at 131.

286. *Id.* at 132.

287. 932 N.E.2d 260 (Ind. T.C. 2010).

November 15, 2006, Katherine Boehle died testate. She was survived by a son and her nephew. At the time of Katherine's death, her son was a fifty-six-year-old adult with Down Syndrome who resided in an assisted living facility. Katherine's will established a testamentary special supplemental needs trust (the "Trust") by which she sought to create a purely discretionary supplemental care fund for the benefit of her son in order to avoid displacing any public or private financial assistance that was otherwise available to him.²⁸⁸ The Trust further provided that upon the death of her son, the Trust would terminate, and the remaining corpus would be distributed to Katherine's nephew.²⁸⁹ Katherine's estate (the "Estate") timely filed its Indiana inheritance tax return "valuing all beneficiaries' interests in the Trust as future interests,"²⁹⁰ which the probate court accepted as filed.²⁹¹ The Department challenged the Estate's calculation of its inheritance tax liability, and the Estate filed a petition to docket trust asking the probate court to establish the amount of the tax. The probate court ordered that the Estate's inheritance tax liability was to be established under Indiana Code section 6-4.1-6-4. The probate court's order further provided that the Estate's tax calculation, which was based upon a life estate to the son, was fair, and the Estate owed no additional inheritance tax.²⁹² The Department timely filed a motion to correct error, asserting that the probate court erred in determining the Estate's inheritance tax liability. The probate court denied the Department's motion without making any additional findings. The Department timely filed an appeal with the Tax Court.

On appeal, the Department argued for reversal of the probate court's order because the Trustee had complete discretion with regard to distributions which resulted in the son having no "beneficial interest" in the Trust.²⁹³ Therefore, Katherine failed to transfer any real interest in the Trust to her son upon her death.²⁹⁴ The Department also claimed that the son's interest in the Trust was "valueless because the Trust specifically stated he had 'no entitlement to the income or corpus' of the Trust."²⁹⁵ Therefore, the language of the document clearly established that the true purpose of the Trust was not to imperil any public or private financial assistance that Katherine's son might be entitled to receive, and "assigning any value other than zero to . . . [the son's] interest . . . [would be] contrary to Katherine's intent."²⁹⁶

As to the son's beneficial interest, the court explained that the Indiana Trust Code designates the beneficiary of a trust as either an "income beneficiary" or a "remainder beneficiary" and that these terms are further defined under the Indiana

288. *Id.* at 261-62.

289. *Id.* at 262.

290. *Id.* at 262.

291. *Id.*

292. *Id.* at 263.

293. *Id.* at 264 (citation omitted).

294. *Id.*

295. *Id.* at 265 (citation omitted).

296. *Id.*

Code.²⁹⁷ The court explained that under the code, there “can be no remainder beneficiary without an income beneficiary.”²⁹⁸ Therefore, a trustee’s discretion in distributing net income is not related to whether a person has an interest in a trust.²⁹⁹ The court further found that the evidence established that Katherine’s son had a legally cognizable interest in the Trust.

As to the value of the son’s interest, the court found that the Trust clearly established Katherine’s intent to provide for her incapacitated son upon her death. To that end, the court found that Katherine’s structuring of the Trust precluded automatic, fixed transfers of income to her son in order to preserve any public or private financial assistance to which he would otherwise be entitled.³⁰⁰ The court explained that the Trust was designed to ensure that Katherine’s son’s income interest would not prohibit his access to either private or public assistance benefits, but that his interest in the Trust was not perpetually set at zero.³⁰¹

5. *Indiana Department of State Revenue v. Estate of Daugherty*.³⁰²—Bernard Daugherty owned a 462-acre farm in Knox County, Indiana. Bernard’s sole beneficiary under his will was his nephew. Bernard’s estate (the “Estate”) at the time of his death in December 2007³⁰³ timely filed an inheritance tax return, claiming deductions for six general types of expenses: funeral, personal representative, farming-related, pre-existing debt, general administrative, and those related to the sale of real and personal property. The probate court accepted the Estate’s inheritance tax return.³⁰⁴ The Department timely filed a petition with the probate court for rehearing and redetermination, arguing that the Estate’s deductions for farming-related expenses were improper. The Estate argued that since Bernard failed to maintain the farm during the fifteen years before his death, the deductions were necessary and proper. The Estate also filed a counterclaim seeking an additional ten deductions for farming-related expenses.³⁰⁵

At the probate court’s hearing on the matters, the Department argued that the farming-related deductions were impermissible because they were business expenses undertaken to maintain, improve, and operate the farm.³⁰⁶ The Department also claimed that the Estate’s counterclaim was untimely, and the probate court lacked jurisdiction over the claim. The Estate moved to dismiss the Department’s petition due to the Department’s failure to meet its burden of proof.³⁰⁷ In the alternative, the Estate claimed that its farming-related deductions were proper because the regulation upon which the Department relied to exclude

297. *Id.* at 264 (citing IND. CODE §§ 30-4-1-2(3), 30-2-14-2(2) (2011)).

298. *Id.*

299. *Id.*

300. *Id.* at 265.

301. *Id.* at 266.

302. 938 N.E.2d 315 (Ind. T.C. 2010).

303. *Id.* at 317.

304. *Id.*

305. *Id.* at 317-18.

306. *Id.* at 318.

307. *Id.*

those deductions was invalid. The Estate also maintained that its counterclaim was timely filed.³⁰⁸

The probate court found that the Department did not exceed its statutory authority. The probate court also found all twelve of the farming-related deductions proper because those expenses should have been "construed as expenses incurred by the personal representative in the administration of the estate and not merely as expenses incurred in the operation of a farming business."³⁰⁹ The probate court also held that the Estate's counterclaim was untimely.³¹⁰ Both sides timely filed appeals with the Tax Court.

On appeal, the Estate asserted that the probate court erred in denying its motion to dismiss and that the probate court also erred when it concluded that it lacked subject matter jurisdiction over the Estate's counterclaim. The Department, on the other hand, asserted that the probate court erred in approving the twelve deductions for farming-related expenses.³¹¹

As to the probate court's ruling on the motion to dismiss, the Estate argued that the probate court's erroneous ruling was due to confusion over who bore the burden of proof. The court found that the issues before the probate court were questions of law, and in construing the regulation at issue, the probate court should have applied the same rules of construction that apply to statutes.³¹² Based on this finding, the court found that the probate court's ruling was not in error when it found that regulation at issue was valid and denied the Estate's motion to dismiss.³¹³

As to the jurisdictional issue, the Estate argued that its counterclaim was compulsory under Indiana Trial Rule 13 and therefore timely filed because the rule extended the 120-day statute of limitations contained in Indiana Code section 6-4.1-7-1 for filing its own petition for rehearing and redetermination.³¹⁴ The court, however, found that the Estate sought affirmative relief with a counterclaim filed approximately 128 days after the probate court's initial determination. The court explained that "Indiana Trial Rule 13 is not a tolling rule; rather, it is a rule of procedure."³¹⁵ Therefore, the Court held that it did not extend the statute of limitations found in Indiana Code section 6-4.1-7-1.³¹⁶

Finally, as to the issue of the probate court's approval of the farming-related expense deductions, the Department argued that since the probate court did not hold that Indiana Administrative Code title 45, section 4.1-3-11 was invalid, it must control. The Estate argued instead that an Indiana Court of Appeals

308. *Id.*

309. *Id.*

310. *Id.* at 319.

311. *Id.*

312. *Id.*

313. *Id.* at 319-20.

314. *Id.* at 320.

315. *Id.* (citation omitted).

316. *Id.*

decision, *In Re Estate of Cook*,³¹⁷ controlled the outcome of this matter. The court found that the *Cook* case did not control the outcome for three reasons. First, the issue in *Cook* concerned whether expenses arising from the discretionary sale of real property are proper inheritance tax deductions, rather than the question of whether expenses incurred to preserve, maintain, and operate a farm are deductible for inheritance tax purposes.³¹⁸ Second, when *Cook* was decided in 1988, the Indiana Administrative Code at issue had not been promulgated.³¹⁹ Third, the regulation was consistent with *Cook*, as the holding in that case was incorporated into the regulation.³²⁰

After a thorough review of the facts of the case in light of the regulation, the court found that only nine of the farming-related expenses were deductible for inheritance tax purposes. Specifically, the court found deductions for clay drainage tiles, electrical repairs, grain bin repairs, and pole barn repairs to have been proper because they were “incurred during the course of administering the estate and were undertaken to preserve, maintain, and repair the assets of the farm.”³²¹ The court also found that expenses related to a fertilizer bill and a pre-existing debt were deductible as lawful claims against the resident estate. The court found the remaining expenses to be related to operating the farming business and therefore reversed the probate court’s order as to those deductions.³²²

C. Sales and Use Tax

1. *AWHR America’s Water Heater Rentals, LLC v. Indiana Department of State Revenue*.³²³—AWHR America’s Water Heater Rentals, LLC (“AWHR”) advertised that it could provide a worry-free solution to providing hot water.³²⁴ During 2003, 2004, and 2005, customers in Indiana contracted with AWHR for its hot water services. According to the contracts, AWHR provided and bore the expenses of installation and repair of a free new or reconditioned water heater for the customer. The customer agreed to pay a monthly fee to AWHR and acknowledged that AWHR retained ownership and title to the water heater at all times.³²⁵ The agreements also provided that upon their expiration, AWHR was permitted to enter the premises to disconnect and remove the water heater.³²⁶

In 2006, the Department determined that AWHR should have collected sales tax from its Indiana customers during the years 2003, 2004, and 2005 because by

317. 529 N.E.2d 853 (Ind. Ct. App. 1988).

318. *Daugherty*, 938 N.E.2d at 321 (citing *Cook*, 529 N.E.2d at 853).

319. *Id.* at 321-22.

320. *Id.* at 322. The *Cook* case was incorporated into 45 IND. ADMIN. CODE § 4.1-3-11(c) (2011).

321. *Id.* at 323.

322. *Id.* at 323-24.

323. 941 N.E.2d 573 (Ind. T.C. 2010).

324. *Id.* at 574.

325. *Id.*

326. *Id.*

leasing tangible personal property to its customers, AWHR was engaging in transactions subject to sales tax. The Department “assessed AWHR with a sales tax liability, a 10% negligence penalty, and interest, totaling \$557,625.19.”³²⁷ AWHR protested the assessment, and after a hearing, the Department issued a letter of findings denying AWHR’s protest. AWHR timely filed an original tax appeal. In the course of the proceedings, AWHR filed a motion for summary judgment, and the Department filed a cross-motion for summary judgment.³²⁸

On appeal, AWHR argued that the imposition of sales tax was in error for two reasons. First, AWHR asserted that it did not lease the water heaters because it never relinquished control to the customers. Alternatively, AWHR argued that the water heaters were real property instead of tangible personal property.³²⁹

The court explained that the existence of a lease arrangement “depends on the purported lessee’s possession and control over the property involved,”³³⁰ and therefore, tax consequences are determined based on the substance, not the form, of a transaction.³³¹ Furthermore, the court found that AWHR’s customers possessed and controlled the water heaters and even though AWHR had access to the water heaters, such access was ultimately controlled by the customer. Therefore, the court characterized the transactions as leases.³³²

As to AWHR’s alternative argument that its transactions were not subject to sales tax because of the characterization of the water heaters, the court disagreed. The court applied the ordinary meaning to “tangible personal property,” which resulted in the finding that the water heater was considered part of the structure and, therefore, real property.³³³ However, the court found that water heaters, prior to their installation, are tangible personal property and that all sales of tangible personal property are taxable even if the property is later converted into real property by attachment.³³⁴ Therefore, the court held that AWHR should have paid sales tax on its purchase of the water heaters. AWHR admitted that it had not. Based on this reasoning, the court affirmed the Department’s assessment of sales tax liability against AWHR.³³⁵

2. *Garwood v. Indiana Department of State Revenue*.³³⁶—In 2009, the Office of the Indiana Attorney General and the Department investigated Virginia and Kristin Garwood’s (the “Garwoods”) business activities and determined that they were selling puppies without remitting Indiana sales and income tax due on those

327. *Id.*

328. *Id.* at 575.

329. *Id.*

330. *Id.* (quoting *Mason Metals Co. v. Ind. Dep’t of State Revenue*, 590 N.E.2d 672, 674 (Ind. T.C. 1992)).

331. *Id.* at 575-76 (citing *Bethlehem Steel Corp. v. Ind. Dep’t of State Revenue*, 597 N.E.2d 1327, 1331 (Ind. T.C. 1992), *aff’d*, 639 N.E.2d 264 (1994)).

332. *Id.* at 576.

333. *Id.* at 577.

334. *Id.*

335. *Id.* at 578.

336. 939 N.E.2d 1150 (Ind. T.C. 2010).

sales.³³⁷ The Department obtained a warrant to search the Garwoods' residence in Harrison County, as well as their commercial properties, to seize certain items related to the sales. The Department also generated jeopardy tax assessments for the Garwoods' purported income and sales tax liabilities, served them to the Garwoods, and demanded immediate payment.³³⁸ When the Garwoods did not pay, the Department seized approximately 240 dogs and puppies from their property and sold them to the Humane Society of the United States for a total of \$300. The Department applied the money from the sale towards the Garwoods' outstanding income and sales tax liabilities.

The Garwoods timely protested their jeopardy assessments to the Department. The Department issued a letter in which it declined to conduct the hearing requested by the Garwoods, as the relief requested by them was available in the Harrison Circuit Court.³³⁹ The Garwoods filed with the Tax Court, seeking a stay of the jeopardy tax assessments. After the conclusion of the final stay, the Department filed a motion to dismiss pursuant to Indiana Trial Rules 12(B)(1), 12(B)(2), 12(B)(3), 12(B)(6), and 12(B)(8).³⁴⁰ The court established that its resolution of the Department's 12(B)(1) claim—lack of subject matter jurisdiction—would also resolve the Department's 12(B)(2), 12(B)(3), 12(B)(6), and 12(B)(8) claims.

The Department presented two alternative arguments in support of its lack of subject matter jurisdiction claim.³⁴¹ First, the Department argued that the Indiana Supreme Court case of *State ex rel. Indiana Department of Revenue v. Deaton* (*Deaton II*)³⁴² controlled the disposition of this matter.³⁴³ Second, the Department argued that the court lacked jurisdiction because the Garwoods had failed to exhaust their administrative remedies.

The court rejected the Department's position that *Deaton II* controlled the outcome of the matter because its holding was inapplicable to the current case.³⁴⁴ The court further explained that unlike the facts of *Deaton II*, the Garwoods had attempted to contest the validity of the jeopardy tax assessments with both the Department and this court, and therefore, *Deaton II* did not control the outcome of this matter. The holding of *Deaton II* simply suggested that the jeopardy tax warrants at issue had not attained the status of "judgments."³⁴⁵

As to the Department's alternative claim, the court determined that the Garwoods' appeal to the court arose under the tax laws of Indiana, and it was an initial appeal of a final determination made by the Department with respect to a

337. *Id.* at 1151.

338. *Id.* at 1152.

339. *Id.* at 1152-53.

340. *Id.* at 1253.

341. *Id.*

342. 755 N.E.2d 568 (Ind. 2001).

343. *Garwood*, 939 N.E.2d at 1153.

344. *Id.* at 1154.

345. *Id.*

listed tax.³⁴⁶ The court found that Indiana Code section 6-8.1-5-3 was silent as to the manner by which a taxpayer may challenge the validity of a jeopardy assessment, and the Department's position would eliminate one administrative path to the Tax Court when there are at least two provided through Indiana Code sections 6-8.1-5-1 or 6-8.1-9-1.³⁴⁷

3. AOL, LLC v. Indiana Department of State Revenue.³⁴⁸—AOL, LLC (“AOL”) was a foreign limited liability company that provided its customers with access to the Internet, e-mail, instant messaging, and other proprietary online content. During the tax periods of January 1, 2003 through November 30, 2006 and May 1, 2006 through June 30, 2007, AOL distributed two types of promotional materials to prospective and current members in several states, including Indiana.³⁴⁹

The first type, “ROM packages,” were produced in two separate phases. First, “AOL’s out-of-state ‘vendors’ copied AOL’s proprietary software onto blank CDs and added graphics to the CDs.”³⁵⁰ Next, the components were shipped to the assembly houses, where the components were compiled into a final package and each package was printed with identifying information. The assembly houses then distributed the completed ROM packages to various destinations, including Indiana.³⁵¹

The second type of promotional materials, “CM [m]aterials[,] consisted of a variety of printed letters, brochures, and other promotional materials.”³⁵² AOL contracted with several out-of-state “letter shops” for the production of the CM materials.³⁵³ During the tax periods at issue, AOL filed monthly Indiana sales and use tax returns with the Department and paid all use taxes along with each return. AOL later filed two claims requesting a combined refund of \$371,464.00. Both of AOL’s claims were denied by the Department. AOL initiated an original tax appeal, and both parties moved for summary judgment.³⁵⁴

In its motion, AOL asserted that three Indiana cases interpreting Indiana Code section 6-2.5-3-2 clearly illustrated that AOL’s “in-state use of the ROM [p]ackages and CM [m]aterials were not subject to Indiana use tax because they were not acquired in retail transactions.”³⁵⁵ The Department, on the other hand, argued in favor of the dismissal of AOL’s claims since “AOL acquired the ROM [p]ackages and CM [m]aterials in taxable retail unitary transactions.”³⁵⁶

The Department argued that AOL’s transactions with the letter shops,

346. *Id.* at 1154-55.

347. *Id.* at 1155.

348. No. 49T10-0903-TA-7, 2010 Ind. Tax LEXIS 54 (Ind. T.C. Dec. 29, 2010).

349. *Id.* at *2.

350. *Id.* at *3.

351. *Id.* at *4.

352. *Id.*

353. *Id.*

354. *Id.* at *6.

355. *Id.* at *9.

356. *Id.*

vendors, and assembly houses should be considered one retail unitary transaction. The court disagreed and held that the undisputed material facts proved the transactions were separate. The court examined each step in the manufacturing process of the ROM packages and CM materials and found that AOL's transactions with regard to the production of promotional materials did "not serve as the basis for imposition of Indiana's use tax."³⁵⁷

The court further explained that in order for AOL to incur a use tax liability, it must have acquired tangible personal property in retail transactions and must have then used, stored, or consumed that tangible personal property in Indiana. The court found that "[w]hile AOL indisputably used the ROM [p]ackages and CM [m]aterials in Indiana, it did not acquire them in retail transactions or retail unitary transactions," and therefore, the Department's denials of AOL's two claims were improper.³⁵⁸

D. Personal Property Tax

1. *Lake County Assessor v. Amoco Sulfur Recovery Corp.*³⁵⁹—Amoco Sulfur Recovery Corporation, BP Products North America, Inc., and BP Products North America, Inc. (collectively, "BP") owned and operated a 1400-acre refinery that stretched across the Indiana cities of Whiting, Hammond, and East Chicago. BP timely filed its business tangible personal property returns for the 2004, 2005, and 2006 tax years.³⁶⁰ BP used the DLGF's personal property tax return forms to complete the returns, following the given instructions. On the returns, BP "reported the actual cost of all of its depreciable business tangible personal property, it deducted the cost of certain property claimed to be exempt air pollution control system (hereinafter, 'APCS') property, and it excluded the assessed value of the APCS property from its overall personal property assessed value computation."³⁶¹

In 2004, the Lake County Assessor (the "Assessor") hired an accounting firm to review the accuracy of BP's returns. The accounting firm did not review the propriety of BP's APCS exemption claim because "it lacked the expertise."³⁶² In 2007, the Assessor hired a refinery engineer to review BP's APCS exemption. The Assessor determined that BP's exemption claim was improper based on the engineer's findings. The Assessor notified BP several times, making it aware of the increase in value of its personal property as a result of the disallowance of BP's claimed APCS exemption.³⁶³ BP challenged the Assessor's increased assessments, arguing that they were untimely.

The Lake County PTABOA conducted a hearing and determined that under

357. *Id.* at *11 (citation omitted).

358. *Id.* at *13.

359. 930 N.E.2d 1248 (Ind. T.C. 2010).

360. *Id.* at 1249.

361. *Id.*

362. *Id.*

363. *Id.* at 1250.

Indiana Code section 6-1.1-9-3, the assessments were timely. BP filed six petitions for review with the IBTR. At a hearing before the IBTR, BP renewed its assertion that the assessments were untimely and requested its prior assessments to be reinstated.³⁶⁴ The IBTR found that BP's returns "substantially complied with the APCS statutes and regulations, [and] the assessments were untimely under Indiana Code . . . [section] 6-1.1-16-1."³⁶⁵ The Assessor initiated an original tax appeal.

On appeal, the Assessor advanced several arguments in support of its claim that the IBTR's grant of summary judgment in BP's favor was in error, but the court identified one dispositive issue: namely, "whether BP's [r]eturns substantially complied with the APCS statutes and regulations."³⁶⁶ Specifically, the Assessor asserted that the altered assessment was timely because the time frame under which the Assessor could alter BP's returns depended on the finding that BP had failed to substantially comply with the APCS statutes and regulations.

The court explained that the main objectives of Indiana's personal property tax system are full disclosure and accurate reporting.³⁶⁷ Indiana's APCS return forms allow for a taxpayer to accurately disclose property entitled to the APCS exemption, and they also allow the Assessor to preliminarily evaluate whether such claim is proper. The court found that by completing these return forms, "a taxpayer need not provide a description of its property that instantaneously demonstrates to the Assessor that the equipment qualifies for the exemption or how the property is used within the air pollution control system."³⁶⁸ Rather, a taxpayer simply needs to identify the property. After a thorough examination of the applicable regulations, the court held that "a taxpayer's inaccurate determination as to its entitlement to a personal property tax exemption is not a per se indicator of bad faith, fraud, dishonesty, or a lack of substantial compliance."³⁶⁹

The court found that for the 2004, 2005, and 2006 tax years, BP's returns substantially complied with the various APCS statutes and regulations; therefore, the court affirmed summary judgment in favor of BP.³⁷⁰

2. *Lake County Assessor v. Amoco Sulfur Recovery Corp.*³⁷¹—In 2010, the IBTR issued a final determination regarding Amoco Sulfur Recovery Corporation and BP Products North America, Incorporated's (collectively, "the Respondents") 2007 personal property assessment. The Lake County Assessor, the North Township Assessor, and the Lake County PTABOA ("Lake County") challenged

364. *Id.*

365. *Id.*

366. *Id.* at 1251.

367. *Id.* at 1252.

368. *Id.* at 1253.

369. *Id.* at 1255 (citation omitted).

370. *Id.* at 1257.

371. No. 49T10-1010-TA-55, 2010 Ind. Tax LEXIS 53 (Ind. T.C. Dec. 27, 2010).

the IBTR's final determination.³⁷² The petition named both Respondents in its caption as well as throughout the petition itself. Lake County also issued a summons to "BP Products North America, Inc." The Respondents filed a motion to dismiss Lake County's appeal under Indiana Trial Rules 12(B)(2) (lack of personal jurisdiction), 12(B)(4) (insufficiency of process), and 12(B)(5) (insufficiency of service of process).

The Respondents had two arguments for dismissal. First, they maintained that Lake County failed to issue a summons and did not even attempt service on Amoco. Second, they maintained that if Lake County had issued summons and served BP, the summons and service were defective and insufficient to give the court jurisdiction.³⁷³

First, the Respondents argued that Lake County was required to file two original tax appeals and issue a summons and effect service upon both Respondents individually since the IBTR handed down two separate final determinations.³⁷⁴ The court, however, found that the IBTR issued only one final determination after having consolidated BP and Amoco's assessment challenges. The court further found that the administrative record indicated that the attorneys for the Respondents presented one assessment challenge, not two challenges. The one final determination served to trigger Lake County's right to appear, and therefore, Lake County was only required to file one tax appeal.³⁷⁵ The court further found that pursuant to Indiana Trial Rule 4.15(F), Lake County's summons and service of process may have been directed to "BP," and they were reasonably calculated to inform Amoco of Lake County's action against it, as the two entities acted as the same entity.³⁷⁶ Therefore, the summons and service were proper.

With respect to the defective summons and service of BP, the Respondents specifically argued that under either Indiana Trial Rule 4.6 or 5(B), service upon BP's attorney was insufficient to establish personal jurisdiction over BP. The court explained that Indiana Trial Rule 4.6 provides that service upon an organization may be made upon a number of individuals, including the organization's agent "*deemed by law* to have been appointed to receive service."³⁷⁷ With this rule in mind, the court further explained that Lake County and the Respondents had an extensive history litigating the propriety of the Respondents' personal property tax assessments. Both parties acknowledged that in the course of this extensive past litigation, BP's attorney accepted service for the Respondents. Therefore, the court found that BP's attorney was the Respondents' appointed agent to receive service, and therefore, service was not defective.³⁷⁸

372. *Id.* at *1.

373. *Id.* at *4.

374. *Id.* at *4-5.

375. *Id.* at *5-6.

376. *Id.* at *6-7.

377. *Id.* at *7 (citation omitted).

378. *Id.* at *8.

E. Utility Services Use Tax

1. *Mirant Sugar Creek, LLC v. Indiana Department of State Revenue*.³⁷⁹—*Mirant Sugar Creek, LLC* (“*Mirant*”) filed an original tax appeal seeking a refund of approximately \$65,000 in utility services use tax (USUT) it remitted to the Department during the month of July 2006. The Department filed a motion for summary judgment claiming that the USUT amount paid by *Mirant* was proper. *Mirant* filed a cross-motion for summary judgment designating as evidence the affidavit of its senior tax analyst, as well as several e-mails between the tax analyst and a tax analyst with the Department. The Department moved to strike both the affidavit and e-mails.³⁸⁰

As to the affidavit of *Mirant*’s tax analyst, the Department asserted that the affidavit should have been struck because it did not satisfy the requirements of the Indiana Rules of Evidence.³⁸¹ The Department argued in the alternative that the court strike the affidavit pursuant to the *Blinn/McCullough* rule.

As to Indiana Evidence Rule 402, which prohibits the admission of irrelevant evidence, the court found that the testimony contained within the affidavit was both helpful and relevant, as it provided background information with respect to the e-mail exchanges between *Mirant* and the Department. Thus, the court denied this objection.³⁸²

As to the Department’s Indiana Evidence Rule 602 objection, the court found that based on the first and third paragraphs of the affidavit, wherein the tax analyst averred personal knowledge of the facts set forth therein and explained the duties of a tax analyst with *Mirant*, the affidavit was based on her personal knowledge. Accordingly, the court denied this objection.³⁸³

As to Indiana Evidence Rule 704(b), which prohibits witnesses from testifying to opinions concerning legal conclusions, the court found the averments within the affidavit to be statements of fact and not legal conclusions. Therefore, the court denied this objection.³⁸⁴

As to the Department’s hearsay objections under Indiana Rule 802, the court found that statements made in the affidavit regarding the content of the e-mails were statements by a party-opponent and did not constitute hearsay since they were statements by the Department offered against the Department. Based on this line of reasoning, the court held the e-mails to be admissible as well and the Department’s objection was denied.³⁸⁵

Finally, as to the Department’s assertion that the entire affidavit must be disregarded pursuant to the *Blinn/McCullough* rule, the court explained that the

379. No. 71T10-0803-TA-18, 2010 WL 2400436 (Ind. T.C. June 16, 2010).

380. *Id.* at *1.

381. *Id.* Specifically, the Department alleged problems with Rules 402, 602, 704(b), and 802.

382. *Id.* at *2.

383. *Id.*

384. *Id.* at *2-3.

385. *Id.*

Blinn/McCullough rule “militates against the granting of summary judgment when ‘a reasonable trier of fact could choose to disbelieve the movant’s account of the facts.’”³⁸⁶ The court, however, determined that this was not a case to which this rule should have been applied. Despite the Department’s argument that the affidavit should be struck because it was vague and conflicting, the court held that the majority of the affidavit appeared to be a rendition of the facts that gave rise to this cause of action. Therefore, the court denied this objection by the Department.³⁸⁷

2. *Mirant Sugar Creek, LLC v. Indiana Department of State Revenue (Mirant II)*.³⁸⁸—Mirant Sugar Creek, LLC (“Mirant”) owned and operated a power plant fueled by natural gas in Terre Haute, Indiana. Mirant purchased natural gas from an out-of-state vendor. The natural gas was shipped to the plant through pipelines the vendor neither owned nor controlled.³⁸⁹ The plant generated electricity by consuming the natural gas and then sold the electricity to an out-of-state customer who, in turn, resold the electricity to its own customers.

In July 2006, the Department’s tax policy division issued a letter informing Mirant that it might be required to pay USUT.³⁹⁰ Shortly thereafter, Mirant began to exchange e-mails with the Department challenging the Department’s position that its natural gas purchases were subject to the USUT, but Mirant filed a USUT return for July 2006 and remitted approximately \$65,000 to the Department. In September 2006, Mirant received an e-mail from the Department which affirmed Mirant’s position with regard to the USUT, and Mirant therefore did not file another USUT return.³⁹¹ Mirant also filed a claim for refund as to the July 2006 payment.³⁹² The Department denied Mirant’s refund claim. Mirant timely filed an original tax appeal, and the parties then filed cross-motions for summary judgment.

The court identified the following issues with regard to the parties cross-motions: (1) “[w]hether Mirant obtained a ruling from the Department providing that it was not subject to the USUT”; and (2) if not, “[w]hether Mirant’s purchases of natural gas were subject to the USUT.”³⁹³

As to the first issue regarding whether Mirant had obtained a ruling from the Department, Mirant argued the Department’s denial of its claim “constitute[d] an impermissible retroactive change in the Department’s interpretation of the USUT law.”³⁹⁴ Specifically, Mirant asserted that its e-mail correspondence with the Department created a binding Letter of Findings (LOF) which exempted Mirant’s

386. *Id.* at *4 (quoting *Insuremax Ins. Co. v. Bice*, 879 N.E.2d 1187, 1190 (Ind. Ct. App. 2008)).

387. *Id.*

388. 930 N.E.2d 697 (Ind. T.C. 2010).

389. *Id.* at 698.

390. *Id.*

391. *Id.* at 698-99.

392. *Id.* at 698.

393. *Id.* at 699, 701.

394. *Id.* at 699 (citation omitted).

purchases of natural gas from the USUT.³⁹⁵ The Department argued that the e-mail exchanges were simply non-binding letters of advice (LOA).

The court found that the e-mail exchanges, taken together, showed that Mirant “merely sought a *generic opinion* as to whether a generator’s natural gas purchases were subject to the USUT.”³⁹⁶ The court further found that it was not discernible what information the Department’s policy analyst used in reaching its final decision. Perhaps most importantly, the court found no publication in the Indiana Register.³⁹⁷ Under Indiana Code section 6-8.1-3-3, such publication would have been required in order for the Department to be bound by the ruling it issued, regardless of whether such a ruling was issued in an LOF or an LOA.³⁹⁸ Therefore, the court rejected Mirant’s position on this issue.

As to the second issue concerning whether Mirant’s purchases of natural gas were subject to the USUT, the court explained that the Indiana Code controlled whether or not the USUT applied. Specifically, the 2006 version of Indiana Code section 6-2.3-3-5 provided that “[g]ross receipts do not include a wholesale sale to another generator or reseller of utility services.”³⁹⁹ The Department argued that a 2008 amendment to the statute served to change rather than clarify the scope of what constituted a “wholesale sale” to another generator.⁴⁰⁰ Mirant, in contrast, argued that the legislature simply intended to clarify what constituted a wholesale sale and that such clarification proved that the General Assembly intended to exempt transactions similar to Mirant. The court sided with Mirant in finding that the amended version of Indiana Code section 6-2.3-3-5 served to express the original intent of the statute more clearly by clarifying “what transactions are to be considered wholesale sales with respect to the purchase of utility services for consumption.”⁴⁰¹ Since neither party disputed that in July 2006, Mirant was engaged in the business of both generating and selling electricity to others, and based on the court’s interpretation of Indiana Code section 6-2.3-3-5, Mirant’s purchases of natural gas were not subject to the USUT.⁴⁰²

Based on its findings, the court denied the Department’s motion for summary judgment in its entirety but granted Mirant’s cross-motion for summary judgment in part.⁴⁰³

*F. Corporate Income Tax: UPS v. Indiana Department of State Revenue*⁴⁰⁴

United Parcel Service, Inc. (“UPS”) included the income of UPINSCO, Inc.

395. *Id.*

396. *Id.* at 700-01.

397. *Id.* at 701.

398. *Id.*

399. *Id.* at 702 (quoting IND. CODE § 6-2.3-3-5(a) (2011)).

400. *Id.* The 2008 amendment was codified at Indiana Code section 6-2.3-3-5(c).

401. *Id.* at 704.

402. *Id.*

403. *Id.*

404. No. 49T10-0704-TA-24, 2010 Ind. Tax LEXIS 55 (Ind. T.C. Dec. 29, 2010).

and UPS Re Ltd. (two foreign reinsurance companies) (collectively, “foreign corporations”) on its Indiana corporate income tax returns before 2001. The foreign corporations were not included on UPS’s 2001 return, and UPS amended its 2000 return in order to remove the income derived from the foreign corporations. After amending its return, UPS requested a refund of \$359,466 in income taxes.⁴⁰⁵ The Department determined after an audit that UPS should have included the income of the foreign corporations on its tax returns. UPS’s claim for refund for tax year 2000 was denied, and the Department also determined that UPS owed taxes on the income of the foreign corporations for 2001, which resulted in \$291,105 in additional tax liability.⁴⁰⁶ UPS protested the Department’s actions to no avail, and it subsequently filed an original tax appeal. The parties then filed cross-motions for summary judgment.

The court explained that in 2000 and 2001, corporate income was subject to numerous taxes, including an adjusted gross income tax that was imposed on the adjusted gross income derived from sources within Indiana. However, pursuant to Indiana Code section 27-1-18-2, the adjusted gross income tax did not apply to insurance companies that were subject to the premiums tax.⁴⁰⁷ UPS argued that it properly excluded the income of the foreign corporations from its Indiana corporate income tax returns for the years at issue “because they were ‘subject to’ the premiums tax under Indiana Code . . . [section] 27-1-18-2.”⁴⁰⁸ Both insurers were foreign insurance companies that charged premiums for property within Indiana. The Department, on the other hand, argued in its motion for summary judgment that the income of the foreign corporations should have been included on the UPS corporate returns “because they were *not* ‘subject to’ the premiums tax: neither filed a premiums tax return nor paid any premiums tax.”⁴⁰⁹ Hence, the court was forced to determine the meaning of the term “subject to” with regard to the Indiana premiums tax. Based on the plain language of the statute, the court held that one was not required to “pay” the premiums tax in order to be “subject to” the tax. Rather, the court explained, one simply had to be under the authority of the premiums tax.⁴¹⁰ The court found further support from the fact that “while domestic insurance companies can *elect* to be ‘subject to’ the premiums tax, foreign insurance companies clearly do not have that option.”⁴¹¹

Based on this reasoning, the court granted UPS’s motion for summary judgment and denied the Department’s motion for summary judgment.

405. *Id.* at *3.

406. *Id.* at *4.

407. *Id.* at *5-8.

408. *Id.* at *8.

409. *Id.* (citation omitted).

410. *Id.* at *10.

411. *Id.* (citation omitted).

